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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC, PETITIONERS

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the unchallenged "common purpose" of a RICO association-in-fact enterprise defeated as a matter of law where members of the enterprise have some divergent goals—an exceptionally important question in the administration of federal justice, both civil and criminal, that has created a split in the courts of appeals?

2. Does the Court of Appeals' hostility to "converting ordinary civil disputes into RICO cases" permit it to substitute its *post hoc* fact-finding for a jury verdict based on substantial evidence in order to circumvent this Court's repeated refusals to narrow the RICO statute?

3. Should the equitable standing rule be adopted in RICO and diversity fraud cases where the wrongdoer will otherwise escape liability for its fraudulent conduct by virtue of the fraudulent conduct itself?

RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioners Craig Outdoor Advertising, Inc., Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC hereby notify the Court that they do not have parent companies. Each are closely-held private companies that do not issue shares of stock to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Craig Outdoor Advertising, Inc., Curtis Massood, Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit reversing the jury's verdict and judgment on the RICO counts against Respondents Wally Kelly and Harold Gustin, and affirming the District Court's dismissal of the RICO claim against Viacom and finding of no standing as to Petitioner Curtis Massood.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-50a) is reported at 528 F.3d 1001 (8th Cir. 2008). The opinion of the District Court granting in part and denying in part Respondents' motion for summary judgment (App., *infra*, 51a-61a) is unreported. The opinion of the District Court granting in part and denying in part Respondents' motion to dismiss plaintiffs' First Amended Complaint (App., *infra*, 62a-66a) is unreported. The judgment of the District Court (App., *infra*, 67a-68a) is unreported.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on June 4, 2008. The Court of Appeal denied a timely petition for rehearing en banc on July 10, 2008 (App., *infra*, 69a-71a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This petition concerns the interpretation of two provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), codified at 18 U.S.C. §§ 1961-68. The first, § 1962(c), states in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

The second provision at issue, 18 U.S.C. § 1961(4), defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or group of individuals associated in fact although not a legal entity."

STATEMENT

The United States District Court for the Western District of Missouri had jurisdiction over this action pursuant to 28 U.S.C. § 1331 as the claims brought under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* raise a federal question. In addition, the District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332, as this action also brings state law claims by citizens of Missouri against citizens of other states, and the amount in controversy exceeds $75,000.

Plaintiffs Curtis Massood ("Massood"), Craig Outdoor Advertising, Inc. ("Craig") and Midwest Outdoor Media, LLC ("Midwest"), filed a Complaint against Viacom Outdoor, Inc. ("Viacom"), Wally Kelly ("Kelly"), Harold Gustin ("Gustin") and others on January 16, 2004.[1] This Complaint alleged violations of the federal Racketeering Influenced and Corrupt Organizations Act ("RICO") (hereinafter "RICO Claims"), as well as state law claims of fraud, tortious interference with a business expectancy, and unfair competition.

This action arose out of a scheme to defraud small billboard operators like plaintiffs out of their investment in, and right to leases for, various premium billboard advertising locations they had identified along railroad lines. New urban billboard locations are valuable because they are difficult to locate; are governed by overlapping federal, state, and municipal regulations; and provide substantial income from advertisers. 254:17-255:13; 407:15-409:4; 414:10-25; 621:17-622:14; 1743:20-1744:19.[2] Defendants' scheme involved inducing plaintiffs and other small billboard operators to reveal the locations of their premium sites to Viacom as agent for various railroads, through the representation that railroad billboard leases would be awarded on a "first-come, first-served" basis.

To accomplish this scheme, Viacom took advantage of its role as leasing agent for the railroads by denying or stalling plaintiffs' valid applications and

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[1] Patriot Outdoor, LLC ("Patriot") was added by amendment on November 1, 2004.

[2] The trial transcript is cited as "page number:line number."

taking the best sites for itself. In addition, defendants used this scheme to devalue the businesses owned by plaintiffs and other small billboard operators so that Viacom could purchase those companies at a reduced price.

On July 21, 2004, Judge Dean Whipple of the United States District Court for the Western District of Missouri partially granted defendants' Motion to Dismiss the First Amended Complaint. The Court found that plaintiff Massood lacked standing to bring his claims and dismissed all counts alleged by Massood. On May 25, 2005, the Court partially granted defendants' Motion for Summary Judgment. The Court found that—as to all RICO Claims against Viacom—the "enterprise" requirement was not met. The Court also granted summary judgment for defendants Gustin and Kelly on plaintiffs' RICO claim under 18 U.S.C. § 1962(a) as well as on plaintiffs' request for injunctive relief.

This case proceeded to trial in July 2005. On July 26, 2005, the jury found in favor of plaintiffs Craig, Patriot, and Midwest and against Viacom on the state law claims, and in favor of plaintiffs and against Gustin and Kelly on the remaining RICO claim. After post-trial motions by both sides, final judgment was rendered on July 18, 2006, awarding actual and punitive damages to Craig in the amount of $2,144,445; to Midwest in the amount of $2,144,445; and to Patriot in the amount of $850,000. In addition, the Court granted plaintiffs a RICO fee award from defendants Kelly and Gustin in the amount of $1,863,840.

On appeal, the Eighth Circuit affirmed the jury verdict and judgment for fraud, tortious interference, and unfair competition against Viacom, ruling *inter alia* that Viacom's failure to tell applicants that it would take the good sites for itself constituted fraud by omission. *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1013 (8th Cir. 2008). But the panel ruled that plaintiffs failed to prove the fraud was "continuing" under RICO because more than a year after the first acts of fraud, defendant Gustin caused Viacom to start sending new applicants letters telling them that Viacom would "review" their applications. *Id.* at 1028-29. The panel did not address how Viacom's failure to admit in its letter that it would take the good sites for itself could cure the fraud the Court of Appeals found Viacom was committing.

The panel also affirmed the District Court's dismissal of the RICO claim against Viacom, but on different grounds. The panel held that evidence of "divergent goals" among some members of an alleged association-in-fact enterprise defeats the "common purpose" requirement of RICO. *Id.* at 1027. The panel also affirmed the dismissal of Massood's claims on standing grounds, rejecting his argument on equitable standing. *Id.* at 1025. The Court of Appeals denied a timely petition for rehearing en banc. App., *infra*, 69a-71a.

REASONS FOR GRANTING THE PETITION

Question One - Is the unchallenged "common purpose" of a RICO association-in-fact enterprise defeated as a matter of law where members of the enterprise have some divergent goals—an

exceptionally important question in the administration of federal justice, both civil and criminal, that has created a split in the courts of appeals?

I. The Court Should Hear this Case to Resolve an Important Question of Statutory Construction that has Split the Circuits: Must Proof of a "Common Purpose" in a RICO Association-in-Fact Enterprise Exclude All "Divergent Goals" among the Members?

The Eighth Circuit's decision that a "common purpose" cannot exist amongst members of a RICO association-in-fact enterprise where the members have "divergent goals"—i.e., purposes *not* in common—will cripple both criminal prosecutions and civil actions.[3] *See Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008). In the criminal arena, the Eighth Circuit's ruling essentially gives the RICO defendant a "Get Out of Jail Free" card. If the decision stands, a defendant need only show that one of the members of the alleged enterprise has a purpose that is not in common with another member of the enterprise to win dismissal or acquittal *for all*.[4]

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[3] The requirements of 18 U.S.C. § 1962(c) "apply whether the RICO claim is civil or criminal in nature." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006); *United States v. Shifman*, 124 F.3d 31, 35 n.1 (1st Cir. 1997) (stating that "the standard is the same for both criminal and civil RICO violations").

[4] This Court recognized the need for increasing clarity of the rules governing association-in-fact enterprises when it granted certiorari in *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) on October 1, 2008.

Similarly, in civil claims, any time a defendant can show that one of the members of the association-in-fact enterprise has a purpose at odds with another—which will necessarily be the case where the enterprise counts both legal and illegal entities amongst its members—the entire claim will fail. This approach defeats the broad remedial purposes of RICO.

The panel's decision in *Craig* adds a new requirement to the enterprise element of RICO: members of an association-in-fact enterprise cannot have "divergent goals." This decision ignores this Court's repeated "refus[als] to adopt narrowing constructions of RICO," *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008)[5]; is in direct conflict with a decision from the Eleventh Circuit Court of Appeals, *see Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006); and has no support in the RICO statute. *See* 18 U.S.C. § 1962(c). Indeed, as this Court observed four months ago in *Bridge*, the "proposed requirement...seems to come out of nowhere." 128 S. Ct. at 2138 (observing that "if petitioners' proposed requirement . . . seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.") Furthermore, this ruling will cripple criminal RICO prosecutions involving association-in-fact enterprises and severely hinder civil RICO claims. This definition of "common purpose" was never intended by Congress, and this Court should repudiate it.

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[5] The Court of Appeals decision in this case was handed down less than a week before this Court's opinion in *Bridge*.

A. The Court of Appeals' Ruling Is In Direct Conflict With This Court's Instructions Refusing to Narrow the RICO Statute

RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). RICO "is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). This results from Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,'" and "the statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 497-98 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

A private party who has been injured in his property may sue for damages if he can show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496. An enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

There is "no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *United States v. Turkette*, 452 U.S. 576, 580 (1981). An association-in-fact enterprise is "an entity, for present purposes a group of persons associated together for *a common purpose* of engaging in a course of conduct,"

that is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583 (emphasis added).

Notwithstanding the plain language of *Turkette*, the Court of Appeals held that a common purpose among enterprise members is not sufficient—indeed, it ceases to exist—where there is evidence of "divergent goals." *Craig*, 528 F.3d at 1027 (holding that "divergent goals among members of a purported association-in-fact enterprise is a fatal problem to a RICO claim"). In other words, pursuant to the Eighth Circuit's new requirement, if there are non-common purposes among the RICO enterprise members, then the stated and otherwise uncontroverted common purpose is eviscerated. This narrowing of RICO's enterprise element is unsupportable. Indeed, the Eighth Circuit's decision in *Craig* directly conflicts with precedent of this Court. *See, e.g.*, *Bridge*, 128 S. Ct. at 2145 (refusing to adopt "narrowing constructions of RICO") (citing *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) (rejecting "the argument for reading an organized crime limitation into RICO's pattern concept"); *Sedima*, 473 U.S. at 481 (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'")).

Here, the Eighth Circuit's "narrow construction" of RICO's common purpose requirement is without question "counterproductive and a mismeasure of congressional intent." *H.J., Inc.*, 492 U.S. at 248-49. As a result of this erroneous decision, it is no longer enough to comply with this Court's mandate that an association-in-fact have a "common purpose." *Turkette*, 452 U.S. at 583. Henceforth in the Eighth Circuit, a RICO claim involving an association-in-fact enterprise will survive a motion to dismiss only if the members of the enterprise have (1) a common purpose *and* (2) no purposes that are *not* in common. But as this Court has noted time and again, it is not the province of the courts to "rewrite RICO." *Bridge*, 128 S. Ct. at 2145.

The Eighth Circuit should not be allowed to "adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Id.* Petitioners respectfully request this Court to grant certiorari and reverse the Eighth Circuit's holding. *See H.J. Inc.*, 492 U.S. at 236.[6]

B. The Eighth Circuit Decided an Important Element of RICO Law In A Manner That Directly Conflicts With The Recent Ruling of the Eleventh Circuit

The Eighth Circuit's opinion in *Craig*, 538 F.3d 1001, directly conflicts with the Eleventh Circuit's holding in *Williams v. Mohawk Indus., Inc.*, 465 F.3d

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[6] Alternatively, this Court could vacate the Eighth Circuit's decision and remand for reconsideration in light of *Bridge*.

1277 (11th Cir. 2006). In fact, the only case upon which the Eighth Circuit relied—*Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004)—was expressly rejected by the *Williams* court. 465 F.3d 1277.

In *Williams*, hourly employees brought a class action alleging that defendant Mohawk Industries knowingly employed and harbored illegal workers, allowing it to reduce labor costs in violation of RICO. 465 F.3d at 1277.[7] The enterprise consisted of "Mohawk and third-party temp agencies/recruiters," and "the recruiters and Mohawk share[d] the common purpose of obtaining illegal workers for employment by Mohawk." *Id.* at 1284 (quotations omitted). The Eleventh Circuit found the plaintiffs had "properly alleged a common purpose for the purposes of RICO." *Id.* at 1285.

In holding the RICO claim sufficiently pled, the Eleventh Circuit recognized that its holding was consistent with recent decisions in the Second, Sixth, and Ninth Circuits,[8] but it was "in conflict with the

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[7] The United States District Court for the Northern District of Georgia denied defendant's motion to dismiss RICO claims and the Court of Appeals affirmed. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005). This Court initially granted certiorari, but dismissed the writ and remanded after oral argument. *Id.* This opinion is the Eleventh Circuit's decision on remand.

[8] *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004) (former employees alleging employer used illegal immigrants in order to depress wages); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (legally documented workers alleging that employers leveraged hiring of undocumented workers in order to depress wages); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001) (company alleging competitor hired undocumented workers in order to underbid competing firms).

Seventh Circuit's decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004)." *Id.*

In *Baker*, an employees' class-action lawsuit alleged that a meat processing facility conspired with recruiters and violated RICO by employing illegal workers in an effort to drive down employee wages. 357 F.3d at 687. The Seventh Circuit determined that the members of the enterprise—defendant plus "the persons and organizations who help it find aliens to hire"—did not share a common purpose because the members had "divergent goals: IBP want[ed] to pay lower wages; the recruiters want[ed] to be paid more for services rendered (though IBP [wanted] to pay them less); [and] the Chinese Mutual Aid Association want[ed] to assist members of its ethnic group." *Id.* at 691.

The Eleventh Circuit specifically addressed *Baker*, stating that in its circuit, "there has never been any requirement that the 'common purpose' of the enterprise be the **sole purpose of each and every member of the enterprise.**" *Williams*, 465 F.3d at 1285-86 (emphasis added). The Court then noted that "all that is required is that the enterprise have **a** common purpose." *Id.* at 1286 (emphasis in original).

The Eighth Circuit's ruling cannot be reconciled with the holding in *Williams*. Rather than requiring **a** common purpose, the Eighth Circuit requires no "divergent goals," or no purposes *not* in common. Because this new requirement directly conflicts with the holding of another Court of Appeals petitioners respectfully request this Court reverse the Eight Circuit's erroneous holding that "divergent goals" are a

"fatal problem to a RICO claim." *Craig*, 528 F.3d at 1027.

C. The Eighth Circuit's Requirement That Enterprise Members Have No Divergent Goals Will Cripple RICO Criminal Prosecutions

Henceforth in the Eighth Circuit, a defendant only need show that the members of the alleged enterprise have "divergent goals" to escape RICO's reach. Irrespective of whether the association-in-fact has a common purpose, if the members have purposes that are not in common, the RICO claim fails.

The risk to prosecutions is illustrated by the facts in *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994). Victor Orena was convicted of racketeering and murder. *Id.* at 708-09. The alleged association-in-fact enterprise consisted of "five New York families"; the defendant was the acting "head boss" of the entire organization. *Id.*

On appeal from his conviction, Orena argued that the enterprise was legally insufficient as a result of "conflict" between the members of the enterprise. *Orena*, 32 F.3d at 710. Orena contended that because the enterprise members were at war with each other, they could not have constituted a RICO association-in-fact enterprise. *Id.* at 709. The Second Circuit disagreed, holding that "the existence of an internal dispute does not signal the end of an enterprise." *Id.*

If the Eighth Circuit's ruling were to stand, cases like *Orena* would result in dismissals or

acquittals. It will often occur that an association-in-fact enterprise comprised of different criminal actors will have within it members with non-common purposes. In *Orena*, for example, it is indisputable that members of the enterprise had some "divergent goals." 32 F.3d at 708. Indeed, Orena, the head boss of the collective enterprise, was convicted of murdering the "boss" of one of the other enterprise families.[9] *Id.* Goals cannot be more divergent. *Id.* If the Eighth Circuit's definition of a common purpose had been applied to *Orena*, Orena would have almost certainly been acquitted, or the charges against him dismissed.

Indeed, *Baker's* holding is untenable for this very reason. The *Baker* Court held that because the recruiters want to be paid more and the employers want to pay them less, there is no common purpose amongst the members of the enterprise, and, thus, no RICO claim. 357 F.3d at 691. But this makes no sense. In traditional RICO drug distribution enterprises, for example, dealers want to be paid more and suppliers want to pay them less. Does that mean that RICO claims against drug operations cannot proceed?

Simply put, if the Eighth Circuit's definition of "common purpose" stands, prosecution of the very conduct for which RICO unquestionably was enacted will be threatened. *See Turkette*, 452 U.S. at 589 (quoting the Organized Crime Control Act of 1970, 84 Stat. 922). Indeed, "[w]hole areas of organized criminal

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[9] Victor Orena was the head boss of the "Colombo Organized Crime Family of La Cosa Nostra." *Orena*, 32 F.3d at 708. Thomas Ocera, the murder victim, was the "family captain" of the Colombo Family – one of the families included in "La Cosa Nostra." *Id.*

activity [will] be placed beyond the substantive reach" of the RICO statute. *Id.*

This Court has noted that Congress enacted RICO as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. The Eighth Circuit's new requirement will do the opposite—indeed, it will make it harder to prosecute and convict criminals. Certainly this is not what Congress intended.

D. It Is Not the Eighth Circuit's Job To Edit the RICO Statute; If "Narrowing" Is Desirable, It Is Up To Congress

In *Craig*, the Eighth Circuit concedes its hostility toward civil RICO claims, stating that "we have in the past rejected attempts to convert ordinary civil disputes into RICO cases." 528 F.3d at 1029; *see also Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991) (noting that RICO was not intended to apply to "ordinary commercial fraud"). But the Eighth Circuit's agenda is misplaced. It is not the province of the courts to decide that a statute's reach is too broad and thereafter act to narrow it. *See H.J., Inc.*, 492 U.S. at 240 ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court.") While it may well be frustrating to the Eighth Circuit that RICO encompasses what it views as "ordinary civil disputes," the panel was not "at liberty to rewrite RICO to reflect [its] views of good policy." *Bridge*, 128 S. Ct. at 2145. As this Court instructs, "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Id.* (quoting *Sedima*, 473 U.S. at 499-500).

While "[t]he occasion for Congress' action [in enacting RICO] was the perceived need to combat organized crime," Congress "for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 249. Congress intended for RICO to reach corrupt business practices; "[t]he statute's remedial purposes are nowhere more evident than in the provisions of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498.

The Eighth Circuit has introduced a new RICO requirement that is found nowhere in the statute or case law in an effort to stem what the panel viewed as unduly proliferate civil RICO claims. This approach violates this Court's direction. *Bridge*, 128 S. Ct. at 2145.

E. The Eighth Circuit's Decision in *Craig* Was Plainly Wrong

In their Complaint, plaintiffs alleged three association-in-fact enterprises: Viacom and Burlington Northern Santa Fe Railroad; Viacom and Kansas City Southern Railroad; and Viacom and Boston & Maine Railroad. *Id.* at 1026. The common purpose of each of these enterprises was "leasing property owned by the railroads to outdoor billboard businesses." *Id.* at 1026. There is no dispute that Viacom had this purpose in common with each of the railroads. This truth notwithstanding, the Eighth Circuit held that no common purpose existed because the enterprise members had three purposes that were *not* in common. *Id.* at 1026-27. Specifically, the Court stated:

By Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom. Plaintiffs described several instances in which Viacom's conduct resulted in sites being "spaced out" by billboards erected on neighboring property, thus preventing the affected railroad from ever benefiting from a billboard located on its property. It is unlikely that the railroads would cooperate with Viacom to achieve this goal. Plaintiffs also described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits. We cannot conceive how this goal was shared by any of the railroads, which presumably did not care who held the license for a particular billboard site as long as fees were paid. Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets. Again, this goal would appear to be Viacom's alone, since competition for billboard sites on railroad property would presumably be in the railroads' best interests. In short, the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had "a common purpose of engaging in a course of conduct." And "divergent goals" among members of a purported association-in-fact enterprise is a "fatal problem" to a RICO claim.

Id. (quoting *Turkette*, 452 U.S. at 583; *Baker*, 357 F.3d at 691).

While plaintiffs readily agree that the railroads did not share in Viacom's desire to space out competitors' billboard sites, discourage site applicants who intended to resell their billboards, and eliminate competition in the billboard markets, it matters not—the Eighth Circuit's focus is, again, misplaced. RICO does not require plaintiffs to show that the railroads and Viacom shared every purpose—it requires only that plaintiffs show the railroads and Viacom shared **a common purpose**. *See Williams*, 465 F.3d at 1286 (stating that "all that is required [to successfully plead an association-in-fact enterprise] is that the enterprise have *a* common purpose.") This the plaintiffs did.

Accordingly, this Court should grant certiorari to reject the Eighth Circuit's requirement of no "divergent goals," reverse the finding of no RICO enterprise, and remand for trial on these counts.

Question Two - Does the Court of Appeals' hostility to "converting ordinary civil disputes into RICO cases" permit it to substitute its *post hoc* fact-finding for a jury verdict based on substantial evidence in order to circumvent this Court's repeated refusals to narrow the RICO statute?

II. The Court Should Hear this Case to Require the Eighth Circuit Court of Appeals to Follow This Court's Instructions Against Narrowing RICO By Reversing a Jury Verdict against Defendants Kelly and Gustin that was Supported by Substantial Evidence

The Eighth Circuit panel reversed a jury verdict based on its conclusion that a Viacom form letter "expressly terminated" the racketeering activity despite the testimony of Kelly and Gustin that Viacom had not changed the policies the jury found to be fraudulent. The jury considered that letter—allegedly distributed by Viacom to new site applicants beginning in January 2003—and rejected defendants' contention that dissemination of the letter terminated the fraud. Moreover, the Eighth Circuit's conclusion clearly contradicts its own analysis of plaintiff's state-law fraud claims, where it found fraud by omission in Viacom's failure to warn applicants it planned to take all the good sites for itself.

The Eighth Circuit's substitution of its fact-finding for that of the jury's verdict can be explained only by the panel's distaste for applying RICO to "ordinary civil disputes" and its rebellion against this Court's often repeated instruction that RICO cannot be narrowed based on judicial hostility. *Craig*, 528 F.3d at 1029; *see Bridge*, 128 S. Ct. at 2145. This Court should grant certiorari to correct the Eighth Circuit's open defiance of controlling authority and to protect the broad scope of RICO from Trojan-horse attempts to narrow its scope through appellate fact-finding.

A. The Eighth Circuit's Analysis of the Evidence Is Untenable and Contradictory

Judgment as a matter of law following a jury verdict is appropriate *only* when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *see Galloway v. United States*, 319 U.S. 372, 395 (1943) (judgment as matter of law required only when a verdict could only have been based on "mere speculation"). While the Eighth Circuit acknowledged that a jury's verdict is entitled to "extreme deference," it gave no deference whatsoever to the jury's RICO verdict in this case. *Craig*, 528 F.3d at 1009.

The Eighth Circuit characterized the racketeering activity as "using the mails and wires to conceal or misrepresent the review process; not the review process itself." *Craig*, 528 F.3d at 1028. It concluded that Viacom misrepresented the review process by concealing the fact that defendants would *steal* good sites:

> [O]nly Viacom was in a position to know that its application-processing procedures included an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant.

Id. at 1010.

To succeed on their RICO claim, plaintiffs were required to—and, according to the jury, did—prove

that there was a threat that defendants would continue to use the mails and wires to fail to "inform Plaintiffs that the sites identified in their applications could be appropriated by Viacom if the site was deemed desirable by the local office." *Craig*, 528 F.3d at 1010 (noting that the omission was fraudulent because Viacom possessed superior knowledge not reasonably available to plaintiffs).

In ruling that plaintiffs failed to show that Kelly and Gustin engaged in a pattern of racketeering activity, the panel held that the letter "effectively terminated any allegedly fraudulent scheme . . . by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its *discretion*." *Craig*, 528 F.3d at 1028. But the jury considered and rejected defendants' contention that the letter ended the scheme. The Eighth Circuit's theory would only be plausible if the letter actually revealed that Viacom would take the good sites for itself, thereby nullifying the fraud. But the letter quite obviously did nothing of the sort.

The critical part of the letter states:

> Please be informed that until such time as you receive written confirmation of the approval of your application and a license agreement is fully executed, *you are not authorized to survey the subject property, apply for any permits or take any other action which impacts the subject land, including but not limited to applying for zoning approval or variance, without the express and specific written consent of Viacom Outdoor,*

> *which may be given or denied at the sole discretion of Viacom Outdoor.*

App., *infra*, 72a-73a.

Notably, the letter does not identify who is reviewing the applications and does not tell applicants that Viacom will take the good sites for itself. Contrary to the Eighth Circuit's factual finding on Viacom's fraud, it does not notify the applicant that an application may be subject to "an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant." *Craig*, 528 F.3d at 1010. That is the fraud the Eighth Circuit identified – and the letter does nothing to correct it.[10]

Even if the panel somehow could interpret the letter as nullifying the fraud, this is certainly not the only *reasonable* interpretation. The jury read this letter itself, considered all the other evidence not even mentioned by the Eighth Circuit, and determined that Kelly and Gustin engaged in a pattern of racketeering activity.

Additionally, substantial evidence (ignored by the Eighth Circuit) demonstrates that the fraud continued. In analyzing plaintiffs' state law claims, the Eighth Circuit itself found evidence that applicants continued to be defrauded by the review process after January 2003, when Viacom began distributing the

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[10]Importantly, even if the letter had "terminated" the fraud—which it did not—it did not "cure" the fraud as the letter was not sent to any of the plaintiffs. The letter went only to "new applicants" from "2003 forward."

letter. *Craig*, 528 F.3d at 1011 (discussing Viacom's rejection of two site applications due to the plaintiff's alleged "lack of activity" on the application in March 2003). In addition, Viacom's President Kelly asserted at trial in July 2005 that if a site application came in "tomorrow," Viacom could take the site if it wanted and that defendants had no obligation to tell applicants of Viacom's plan. The Eighth Circuit found that failing to disclose that plan was fraud, yet found the fraud was not "continuing" despite Kelly's testimony. *See Craig*, 528 F.3d at 1001.

Further, whistleblower David Gilley testified he was being pressured to lie about the review process in March 2003—*after* Viacom claimed it started distributing to new applicants the letter, which the Panel claimed "terminated" the fraud. The Eighth Circuit did not discuss or acknowledge this evidence, but the jury could have reasonably inferred from this evidence that defendants continued to engage in a pattern of racketeering activity.

B. The Panel's Usurpation of the Jury's Fact-Finding Role Was Motivated by Its Desire to Narrow the Scope of RICO in Direct Conflict With This Court's Precedents

The panel substituted its *post hoc* interpretation of the letter for that of the jury, which considered the letter in the context of the whole trial and the testimony of the witnesses. This usurpation of the jury's role breeds contempt for the rule of law. Even if this letter were ambiguous, plaintiffs are entitled to "all favorable inferences that can reasonably be drawn from

the evidence." *Craig*, 528 F.3d at 1027 (citing *Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007)). The jury could reasonably have concluded that the letter failed to correct the fraud and that the fraud continued after the letter's issuance.

In *any* case, an appellate court's usurpation of the jury's fact-finding role would constitute clear and obvious error. The Eighth Circuit's untenable analysis of the evidence here demonstrates its apparent belief that, *in RICO cases*, it may disregard an otherwise rational jury verdict to further its mission of keeping plaintiffs from converting "ordinary civil disputes into RICO cases." *Craig*, 528 F.3d at 1029. This policy choice by the Eighth Circuit flaunts the text of RICO and has been expressly repudiated by this Court, most recently in *Bridge*. 128 S. Ct. at 2145 ("[W]e are not at liberty to rewrite RICO to reflect [petitioners']—or our—views of good policy.").

This Court has repeatedly rejected attempts by various courts of appeal to limit the scope of RICO based on judicial policy concerns. 128 S. Ct. at 2145 ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."); *see also Sedima*, 473 U.S. at 499-500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it . . . .")

In light of this Court's clear instruction that RICO must not be limited based on judicial policy concerns, the Eighth Circuit's narrowing of RICO by commandeering the jury's fact-finding role repudiates this Court's directions by narrowing RICO through

fact-finding, rather than through direct legal rulings on the scope of the statute. Should this Court permit lower courts to end run this Court's instructions by usurping the jury's fact-finding role, this Court's precedents in *Bridge*, *Sedima*, and other cases will quickly become dead letters. Given the importance of RICO as a broad tool to combat organized crime, this Court should grant certiorari to reinforce its insistence that lower courts may not restrict the scope of RICO based on policy concerns through appellate fact-finding or any other vehicle.

Question Three - Should the equitable standing rule be adopted in RICO and diversity fraud cases where the wrongdoer will otherwise escape liability for its fraudulent conduct by virtue of the fraudulent conduct itself?

III. The Court Should Hear this Case to Decide a Substantial Question of Federal Law on Which it has Not Ruled: Whether Equitable Standing Should Apply in RICO and Diversity Fraud Cases Where the Derivative Standing Allows a Wrongdoer to Escape Liability Entirely

A. The Equitable Standing Rule From Federal Securities Law Should Apply to RICO and Fraud Claims To Give Mr. Massood Standing Where the Wrongdoer Would Otherwise Benefit From Its Fraudulent Conduct

Plaintiff Curtis Massood brought RICO and state law claims against defendants to recover the "loss he suffered as a result of the lost value in the Wilson-

Curtis shares he owned."[11] *Craig*, 528 F.3d at 1024 (quotations omitted). In plaintiffs' First Amended Complaint, Massood alleged that Viacom fraudulently denied his billboard applications and obtained the locations for itself, in part, to lower the value of stock in Wilson-Curtis, Inc.—a company partially owned by Massood—so it could purchase Wilson-Curtis at a reduced rate and eliminate Massood as a competitor in the market.

The District Court ruled that, as a shareholder, Massood lacked standing to sue for injury to the Wilson-Curtis corporation under the derivative standing rule, and dismissed his claims. *Craig*, 528 F.3d at 1024-25. The Eighth Circuit affirmed the District Court's decision. *Id.* at 1025. Both courts erred.

While it is true that, pursuant to the "shareholder derivative rule" an individual only has standing to pursue a derivative suit on behalf of a corporation if he/she is presently a shareholder in the corporation, equity demands a different rule in the unusual situation—present here—where the fraudulent activity of the wrongdoer (Viacom) enabled it to buy the corporation (Wilson-Curtis) victimized by its wrongful conduct. In such circumstances, equitable standing avoids the unfair result of allowing Viacom to benefit from its fraudulent conduct by depriving Massood from seeking recourse through the corporation. *See, e.g., Miller v. Steinbach*, 268 F. Supp.

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[11]Massood brought RICO claims under 18 U.S.C. § 1962 (a), (b), (c), and (d), and state law claims of fraudulent misrepresentation, tortious interference with a business expectancy, and unfair competition.

255, 267 (S.D.N.Y. 1967) (holding that a former shareholder could sue for his derivative injuries—even though the corporation on behalf of which he sued had been merged into another corporation—where "the very merger itself took place because of the allegedly wrongful activities of the directors of the old corporation and the management of the surviving corporation"). As the court in Miller noted, "[t]o hold that the surviving corporation inherits a derivative right of action where said corporation has wrongfully taken part in the very acts complained of would be to reach an incongruous and highly inequitable result." *Id.*

Though it has never been applied to RICO actions, equitable standing is a well-recognized doctrine. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.1.08[1] (3d ed. 2000) (a "plaintiff shareholder implicates the surviving corporation in the alleged wrongdoing relating to the merger . . . the right to bring a derivative suit *does not pass* to the surviving corporation and the *former* shareholders" *retain standing* to bring suit to recover for their otherwise derivative injuries) (emphasis added); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988), *superseded by statute on other grounds*, 15 Pa. Const. Stat. § 1717 (1990), *as recognized in B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019 (M.D. Pa. 1992) (standing granted to plaintiffs where merger took place because of allegedly wrongful conduct of directors of old corporation and management of new corporation).

Massood was approached by Viacom during the summer of 1997 inquiring about the possible acquisition

of Wilson-Curtis. *Craig*, 528 F.3d at 1024. After identifying new billboard locations in December of 1997 and inquiring about leases for those locations in early 1998, Viacom fraudulently denied his applications and obtained the locations for itself. *Id.*

Mr. Massood alleges that this fraudulent conduct was committed—not only for the purpose of stealing the sites—but for the additional purposes of lowering the value of Wilson-Curtis so that Viacom could purchase it at a reduced value *and* eliminate Massood as a competitor. *Id.* This conduct improved the competitive position of Viacom because it obtained for "free" the new billboard sites Massood had proposed as well as the other billboard locations owned by Wilson-Curtis. *Id.* Massood was damaged as a result. *Id.*

Unlike plaintiffs in the derivative cases cited by the District Court (App., *infra*, 62a-66a) and the Eighth Circuit (App., *infra*, 34a-38a), Mr. Massood cannot rely upon Wilson-Curtis to pursue a derivative action because his former company is now owned 100% by Viacom. Indeed, if Massood is not permitted to pursue his claims, then Viacom will escape liability for the fraudulent conduct alleged by Massood in plaintiffs' First Amended Complaint by virtue of the fraudulent conduct itself.

B. The Second and Third Circuits Have Recognized That Equitable Standing Is Required in Securities Cases Where a Wrongdoer Would Otherwise Benefit From Its Fraudulent Conduct

In analyzing comparable standing issues related to claims brought pursuant to Section 16(b) of the Securities and Exchange Act of 1934, the Second Circuit held that shareholders could pursue an action to disgorge defendants of ill-gotten gains. *Mendell, in Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 726 (2d Cir. 1990), *aff'd*, 501 U.S. 115 (1991). Ironically, in that case, plaintiff was a former shareholder of Viacom International, Inc. ("International") which, during the course of the suit, was acquired through a merger transaction by a shell corporation—Viacom, Inc. *Id.* After the merger, "defendants asserted that plaintiff no longer had standing to maintain his § 16(b) suit since he was no longer a shareholder of International." *Id.*

In *Mendell*, the District Court for the Southern District of New York dismissed plaintiff's claims on the same standing rationale applied by the District Court here—and the Second Circuit reversed. 909 F.2d 724. It found that "a rule that allows insiders to avoid § 16(b) liability by divesting public shareholders of their cause of action through a business reorganization would undercut the function Congress planned to have shareholders play in policing such actions." *Id.* at 731.

The Second Circuit's rationale is entirely applicable to the situation here. Mr. Massood alleged that the purchase of Wilson-Curtis was part of a fraudulent scheme by Viacom to steal the sites

identified by Massood, to devalue Wilson-Curtis, and to undermine Massood's competitive position in the market. As the Third Circuit has recognized, where dismissal of a claim "may well leave a wrong unremedied," equitable standing is required. *Blasband v. Rales*, 971 F.2d 1034, 1044 (3d Cir. 1992) (holding that plaintiff has derivative standing related to his standing as shareholder of former company where after merger, successor company refuses to pursue the cause of action).

C. The Rationale For the Derivative Standing Rule Is Not Applicable to the Facts Of This Case

The purpose of the derivative standing rule is to avoid duplicative litigation. That purpose does not apply when—as part of the wrongdoer's fraudulent scheme—an investor sells 100% of the stock of his business to the wrongdoer. If the wrongdoer owns the business at the end of the transaction he has no fear of being sued by himself, so there is no risk of a second suit at all. In these circumstances, the underlying purpose of the standing objection evaporates.

Defendants should not be permitted to take these defensive rules, intended to avoid duplicative litigation, and turn them into an offensive means to escape liability for illegal conduct. *See Maiz v. Virani*, 253 F.3d 641, 654-57 (11th Cir. 2001) (holding shareholder had standing to pursue RICO claims because rationale for general rule barring standing—to prevent double recovery—did not apply under the facts presented).

D. Plaintiff Massood Makes Individual Claims Not Dependent Upon "Lost Value" in Wilson-Curtis Shares in Counts III and V of the First Amended Complaint

Though Massood believes the Eighth Circuit erred in affirming the District Court's dismissal of all of his claims, at the very least the dismissal of Massood's claims in Counts III and V of the First Amended Complaint should be reversed. While "'RICO standing will not arise solely because one is a shareholder . . . in a company that [is a] target of [an] alleged RICO violation'[,] it does not necessarily follow that he lacks standing to seek RICO damages in his own right." *Maiz*, 253 F.3d at 654-55 (quoting *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir. 1998)).

In *Maiz*, the Eleventh Circuit granted plaintiffs standing on some of their claims because they were not seeking damages "'solely' on the ground that they were shareholders . . . of the [injured] corporations." *Id.* at 657. This is the case with regard to Massood's claims in Counts III and V.

In Count III, Massood seeks to recover for the damages he suffered as a result of defendants' acquiring an interest in or maintaining control over an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(b). In Count V, Massood alleges he was injured as a result of defendants' conspiracy to violate the RICO statute. This violation injured Massood individually—separate and apart from his status as a shareholder of Wilson-Curtis. Therefore,

his claims made pursuant to §§ 1962(b) and (d) of the RICO statute should not be dismissed based upon the District Court's derivative standing analysis.

In the First Amended Complaint, Massood alleged that the "[d]efendants used these funds to eliminate Viacom's competitors . . . increasing their hold on the marketplace [which] . . . in turn, made it more difficult [for Massood] to compete with Viacom." This is an individual injury not owned by Wilson-Curtis. Massood suffered this injury when defendants acquired and maintained control over Wilson-Curtis in violation of § 1962(b) as alleged in Count III.

Though he sold Wilson-Curtis, Massood remains an active billboard entrepreneur in the Kansas City metropolitan area, in Salt Lake City, and in Boise, Idaho. Because the defendants improved their competitive position vis-à-vis Massood through their pattern of racketeering, Massood is entitled to recover for his resulting injuries. *See Wilson v. Askew*, 709 F. Supp. 146, 153 (W.D. Ark. 1989); GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 31 n.5 (2d ed. 2000).

Indeed, the Eighth Circuit has held that shareholder-plaintiffs should not be barred from pursuing such a "direct, personal [claim] . . . even [where a] corporation's rights are also implicated." *Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997) (holding that as shareholders were "prevented from practicing their trade" they were separately though concurrently injured and had standing to bring suit). Likewise, Massood is entitled to recover for the conspiracy

alleged in Count V, at least as to the conspiracy to violate subsections (b) and (c) of 1962.

This Court should grant certiorari and vacate the Eighth Circuit's judgment affirming the District Court's dismissal of Massood's RICO claims for lack of standing with instructions to remand Massood's claims to the District Court for trial.

CONCLUSION

The Court should grant this petition for certiorari and either schedule argument or vacate the Eighth Circuit's opinion and remand to the Eighth Circuit for reconsideration in light of *Bridge*, and grant such other relief as is just.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3335
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.;
Defendant,

Wally Kelly;
Defendant-Appellant,

Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3337
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.,
Defendant-Appellant,

Wally Kelly; Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3339

Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.; Wally Kelly; Randall F. Romig; Randy Jackson, Defendants,

Harold Gustin, Defendant-Appellant, CPA Carlton Beckstrom,
Defendant.

No. 06-3341
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellants,

v.

Viacom Outdoor, Inc.; Wally Kelly,
Defendants-Appellees,

Randall F. Romig; Randy Jackson,
Defendants,

Harold Gustin,
Defendant-Appellee,

CPA Carlton Beckstrom,
Defendant.

Appeals from the United States District Court for the Western District of Missouri.

October 15, 2007, Submitted

June 4, 2008, Filed

Before BYE, BOWMAN, and SMITH, Circuit Judges.

OPINION

BOWMAN, Circuit Judge.

Craig Outdoor Advertising, Inc., Midwest Outdoor Media, LLC, Patriot Outdoor, LLC (collectively "Plaintiffs"), and Curtis Massood, the former owner of a small billboard company, filed this lawsuit in which they alleged that Viacom Outdoor ("Viacom"), and Viacom executives Wally Kelly and Harold Gustin (collectively "individual Defendants")[1] perpetrated a scheme by which Viacom and its employees and consultants would represent to businesses and individuals interested in constructing billboards on railroad property that Viacom was acting as the agent for those railroads with respect to billboard construction and that applications to build on railroad property would be evaluated on a first-come, first-served basis. In reality, however, Viacom employees or consultants reviewed each site application to determine if Viacom wanted to develop the site itself. Plaintiffs and Massood alleged that Viacom misrepresented and omitted information about the review process in an effort to induce them to identify billboard sites. Viacom then appropriated certain sites and covered up the scheme, for example, by falsely stating that another entity had applied for the site first or by failing to forward the site application to the railroad. Plaintiffs and Massood asserted claims for relief based on both Missouri and Connecticut state

law and the civil remedies provisions of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, ("RICO"). 18 U.S.C. §§ 1961-68. Prior to trial, the District Court granted Viacom summary judgment on the RICO claims asserted by Plaintiffs against the company and dismissed all of Massood's claims. A jury returned verdicts in favor of Plaintiffs on their state-law claims and on their RICO claims against Kelly and Gustin. Viacom, Kelly, and Gustin appeal and Plaintiffs and Massood cross-appeal. The parties raise numerous claims, each of which we will address in turn.

I. VIACOM

A. Fraud Claims. Viacom first argues that the evidence was insufficient to support the jury's verdict in favor of Plaintiffs on their state-law fraud claims. A jury verdict is entitled to extreme deference, *Morse v. S. Union Co.*, 174 F.3d 917, 922 (8th Cir.), cert. dismissed, 527 U.S. 1059, 120 S. Ct. 29, 144 L. Ed. 2d 832 (1999), and we will not set it aside unless no reasonable jury could have reached the same verdict based on the evidence submitted, *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.), cert. denied, 521 U.S. 1119, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1997). In conducting our review, we consider the evidence in the light most favorable to the jury verdict. *Id.* Specifically, we "assume all conflicts in the evidence were resolved in [Plaintiffs'] favor, assume [Plaintiffs] proved all facts that [their] evidence tended to prove, and give [Plaintiffs] the benefit of all favorable inferences that reasonably may be drawn from the proven facts." *Morse*, 174 F.3d at 922. Keeping in mind our extremely deferential standard of review, we conclude that the

jury's verdict on Plaintiffs' fraud claims was supported by the evidence.

Plaintiffs asserted fraudulent-misrepresentation claims under Missouri and Connecticut law,[2] pursuant to which they were required to establish the following elements: a false material representation by Viacom; Viacom's knowledge of the representation's falsity or ignorance of its truth; Viacom's intent that Plaintiffs act on the representation "in a manner reasonably contemplated"; Plaintiffs' ignorance of the representation's falsity; Plaintiffs' rightful reliance on the truth of the representation; and proximate injury. *Norden v. Friedman*, 756 S.W.2d 158, 164 (Mo. 1988); see *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 910 A.2d 209, 214 (Conn. 2006) (noting that a fraud claim requires proof that (1) the defendant made a false representation as a statement of fact, (2) the defendant knew the statement was untrue, (3) the defendant made the statement to induce reliance, and (4) the other party relied on the statement to his detriment).

In addition to claims that Viacom fraudulently misrepresented the review process, Plaintiffs also asserted that Viacom's failure to disclose the true nature of the review process constituted a fraudulent omission. Viacom argues that the fraudulent-omission theory should not have been submitted to the jury because, "as a matter of law, Viacom had no duty to disclose" the existence or details of its review process. Br. of Viacom at 31. Under Missouri and Connecticut law, silence may constitute a representation for purposes of a fraud claim if the party sought to be held accountable for fraud conceals material facts that he had a legal duty to disclose. *VanBooven v. Smull*, 938

S.W.2d 324, 328 (Mo. Ct. App. 1997) (per curiam); *Ceferatti v. Boisvert*, 137 Conn. 280, 77 A.2d 82, 84 (Conn. 1950). A legal duty to disclose may arise from a relationship of trust or confidence, an inequality of condition, or superior knowledge that is not reasonably available to the other party. *VanBooven*, 938 S.W.3d at 328; see *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929, 961-62 (Conn. 2005). Under Connecticut law, whether a duty to disclose exists is a question of law. See *Glazer*, 873 A.2d at 961. Under Missouri law, "'[w]hether or not a duty to disclose exists . . . must be determined on the facts of the particular case.'" *Hess v. Chase Manhattan Bank, USA,*, 220 S.W.3d 758, 765 (Mo. 2007) (quoting *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995)). Before we consider the sufficiency of the evidence to support the jury's fraud verdicts, we will address Viacom's argument that it had no duty to disclose details of the review process.

First, the evidence established that Viacom possessed superior knowledge with respect to its review process. Viacom had been engaged by the railroads to operate as their leasing agent and was, by virtue of that position, the gatekeeper for billboard site applications. Plaintiffs, as applicants for railroad billboard sites, had no choice but to submit their applications, including detailed descriptions of site locations, to Viacom for processing. And only Viacom was in a position to know that its application-processing procedures included an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant. Kelly testified that Viacom employed a first-come, first-served policy for railroad billboard applications *except*

in areas where Viacom operated, in which case applications would be reviewed by the local office. See, e.g., Tr. at 1464.

Second, the evidence established that Viacom's superior knowledge of the review process was not reasonably available to Plaintiffs. Viacom did not inform Plaintiffs that their applications would be subjected to the review process. Nor did Viacom inform Plaintiffs that the sites identified in their applications could be appropriated by Viacom if the site was deemed desirable by a local office. Plaintiffs and other applicants, as well as representatives from the railroads, testified that as far as they knew, Viacom was operating strictly as an agent for the railroads in processing these applications and not as a competitor for the sites. Jim Boeh (Midwest Outdoor), Mark Derench (Patriot Outdoor), and Craig Fedynich (Craig Outdoor) testified that they asked Viacom employees whether competing applications had already been submitted for their proposed sites, and they were told that no such applications had been received. Id. at 605-06; 239-40; 420. Viacom did not inform Boeh, Derench, or Fedynich that their applications would be reviewed and that their sites could be appropriated by Viacom. Accordingly, Boeh, Derench, and Fedynich submitted applications with the understanding that Viacom would process those applications on a first-come, first-served basis. Viacom argues that it had no duty to disclose its review process because it was operating as a competitor in an arm's-length transaction for any given site. This argument was rejected by the jury, which credited Plaintiffs' testimony that they submitted their applications to Viacom because Viacom was the leasing agent of the railroads, and they did not consider Viacom

a competitor with respect to their site applications. In these circumstances, we conclude that Viacom possessed superior--indeed sole--knowledge of the review process and that this information was material and was not reasonably available to Plaintiffs. Thus, Viacom had a duty under both Connecticut and Missouri law to disclose such information.

We now address Viacom's claims that the evidence was insufficient to support the jury's verdicts on Plaintiffs' fraud claims. The jury heard testimony from Derench that in the spring of 2002, he inquired of Tom Rende, a Viacom employee, whether Viacom had received any applications for billboard sites in the general vicinity of two sites Derench had identified on Boston and Maine ("B&M") railroad property along I-84 in Waterbury, Connecticut. Rende assured Derench that there had been no such applications. Based on this discussion, Derench, on behalf of Patriot Outdoor, submitted his applications, believing that he would be first in line for the billboard sites identified therein. Derench also testified that when he inquired about the status of his applications, Rende assured him that they were under consideration by the railroad when, according to Derench, the applications had not been forwarded to B&M and were instead under review by Viacom's local office for possible appropriation by Viacom. Derench further testified that based on Rende's repeated assurances that his site applications were being considered by B&M, Derench did not pursue potential sites on nearby, privately-owned property. See Tr. at 704 ("I would have [gone] next door . . . and gone to the south side."). Eventually, Derench was awarded one of the sites he had identified, and Viacom awarded the other site to itself. The jury was entitled to conclude

from this evidence that (1) Rende misled Derench into submitting site applications by implying to Derench that Viacom employed a first-come, first-served policy; (2) pursuant to Viacom's undisclosed review process, Rende forwarded Derench's applications to Viacom's offices for internal review; (3) Rende falsely assured Derench that his applications had been submitted to the railroad; and (4) Viacom eventually appropriated one of the sites identified by Derench. Based on the evidence submitted, we cannot say that no reasonable jury could have found Viacom liable with respect to Patriot's Connecticut fraud claims.

The jury heard testimony that in September 2001, Boeh, on behalf of Midwest Outdoor, submitted applications for two potential billboard sites on Kansas City Southern ("KCS") railroad property along Highway 150 in Missouri. Prior to submitting these applications, Boeh contacted Viacom employee Randy Romig, who stated that there were no applications pending for sites in that area and that "it was first-come, first-served, and that if [Boeh was] there first, the location would likely be" his. Tr. at 230. Despite the apparent absence of competing applications, no action was taken on Boeh's applications for the remainder of 2001 and most of 2002. Boeh called Viacom numerous times inquiring about the delay, and Rende told Boeh that the railroad, not Viacom, was responsible for the holdup. Unbeknownst to Boeh, Rende had forwarded Boeh's applications to Viacom's Kansas City office pursuant to the internal review process. In the meantime, frustrated by the length of the delay and dissatisfied with the answers provided by Rende, Boeh contacted KCS directly in December 2002 and January 2003. The railroad told Boeh that it had approved one of

the two sites months earlier. Assuming that one of his applications had all the necessary approvals, Boeh called Rende for an explanation regarding the delay in notification. Rende told Boeh that he would investigate. On March 21, 2003, however, Boeh received a letter stating that due to Boeh's "lack of activity" on the two site applications, Viacom had denied them both. Id. at 251. Only later did Boeh learn that Viacom had awarded one of the Highway 150 sites to itself while the second site was "spaced out"[3] by another competitor. Boeh testified that had he known the status of his applications, he "would have had the opportunity to go next door" to request permission to construct his billboard on property owned by a lumberyard. Id. at 312. The jury was entitled to conclude from this evidence that (1) Boeh was misled into submitting site applications by Romig's assurance that Viacom employed a first-come, first-served policy; (2) pursuant to Viacom's undisclosed review process, Boeh's applications were forwarded to Viacom's Kansas City office for internal review; (3) Rende falsely implied to Boeh that his applications had been delayed by the railroad; (4) Boeh was falsely informed that his applications had been denied based on Boeh's inaction; and (5) Viacom eventually appropriated one of the sites identified by Boeh. Based on the evidence presented, a reasonable jury could have ruled in favor of Midwest Outdoor on its Missouri fraud claims.

The jury heard testimony that in June 2002, Fedynich, on behalf of Craig Outdoor, called Viacom's Kansas City office to inquire about the procedure for obtaining permission to construct a billboard on Burlington Northern Sante Fe Railway ("BNSF") property along I-670. Viacom's local representative, David Hyatt, told

Fedynich that if Viacom received competing applications for a railroad site, "whoever applied first" would receive a permit. Id. at 420. Hyatt also told Fedynich that Viacom's "railroad management" function was "totally separate" from Viacom's outdoor billboard function and that the two departments "[didn't] share information" and "[did] not communicate." Id. On July 17, 2002, Fedynich applied for a site on the north side of I-670. On August 14, 2002, Viacom issued a letter authorizing Fedynich to pursue a state permit but cautioning that he could not begin construction on the site until Viacom forwarded his application to BNSF, the railroad approved the site, and Viacom issued a lease approval to Fedynich. On August 15, 2002, Fedynich submitted another application to Viacom for a site on railroad property along the south side of I-670. After this application was submitted, Hyatt told David Gilley, then a Viacom employee and later a whistleblower and Plaintiffs' witness, that the Kansas City office did not want Fedynich to obtain a permit for the south I-670 site because Viacom intended to relocate one of its existing billboards to a nearby location and did not want to be "spaced out." On August 22, 2002--one week after Fedynich submitted his application for the south I-670 site--Hyatt submitted an application for the same site on behalf of Viacom's Kansas City office. Viacom issued an authorization letter to Hyatt on the same day his application was submitted. On August 27, 2002, Fedynich received a letter from Viacom denying his application for the south I-670 site because of purported ongoing engineering concerns. Gilley testified that the engineering-concerns rationale was a reference to a dispute between Viacom and BNSF over responsibility for paying an engineering firm's invoices that was

nothing more than a "smoke screen" Viacom was using to delay applications. Id. at 106. In contrast, Viacom presented testimony that the dispute with BNSF over the engineering invoices was the true cause for delay in processing site applications, including Fedynich's. While Fedynich's I-670 applications were pending, local ordinances regarding the spacing of billboards at his proposed locations changed, and Fedynich was thereafter prevented from constructing billboards at the sites he originally identified. Fedynich testified that if he had known about Viacom's review process, he "would probably [have gone] next door to the . . . property owner" or "to another railroad" to apply for permission to construct his billboards. Id. at 450. The jury was entitled to conclude from this evidence that (1) Hyatt misled Fedynich into submitting site applications by telling him that Viacom employed a first-come, first-served policy and kept its railroad management and billboard operations separate; (2) pursuant to Viacom's undisclosed review process, Hyatt reviewed Fedynich's applications on behalf of Viacom's Kansas City office; (3) Viacom denied Fedynich's applications based on an artificial "engineering concerns" rationale; and (4) Viacom eventually appropriated the sites identified by Fedynich. Based on this evidence, a reasonable jury could have arrived at a verdict against Viacom with respect to Craig Outdoor's Missouri fraud claims.

Considering the evidence in the light most favorable to the jury verdict, assuming all conflicts in the evidence were resolved in Plaintiffs' favor, and giving Plaintiffs the benefit of all reasonable inferences that may be drawn from the evidence, we conclude that the jury's verdict on Plaintiffs' state-law fraud claims was supported by the evidence.[4]

B. Evidentiary Issues. Viacom challenges several of the District Court's evidentiary rulings. First, Viacom argues that the District Court erred by permitting Mike Twidle, an employee of Guilford Transportation, the parent company of B&M railroad, and David Schneider, an employee of BNSF railroad, to testify regarding their understanding of the relationship between Viacom and their respective railroad employers. Neither Twidle nor Schneider was called to testify as an expert witness, and Viacom argues that it was improper to permit these witnesses to testify to Viacom's contractual relationship with the railroads, such testimony being irrelevant and unfairly prejudicial. Plaintiffs respond that the lay-opinion testimony of Twidle and Schneider was admissible to rebut the testimony of the Viacom witnesses who asserted that Viacom's agreements with the railroads gave Viacom the unfettered right to appropriate any railroad billboard site identified in an application submitted to Viacom. Viacom also asserts that the District Court erred by permitting site applicants other than Plaintiffs to testify regarding their experiences with Viacom during the application process, again arguing that this testimony was irrelevant and unfairly prejudicial.

We review a district court's evidentiary decisions for abuse of discretion, according such decisions substantial deference. *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 350 (8th Cir. 1994). A non-expert witness may testify to opinions or inferences that are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on

scientific, technical, or other specialized knowledge." Fed. R. Evid. 701.

Twidle first described his employment experience and duties with the railroad, which included managing B&M's relationship with Viacom and reviewing billboard site applications forwarded by Viacom to the railroad for approval. Schneider testified regarding his experience in railroad real estate management, which included "sales, easements, leases, permits, [and] track leases" for BNSF, as well as billboard site review and approval. Tr. Vol. 7 Attach. D at 1. After establishing the witnesses' pertinent work experience and the bases for their opinions, Plaintiffs elicited testimony from Twidle and Schneider that it was industry practice for railroad leasing agents such as Viacom to employ a first-come, first-served policy with respect to railroad billboard site applications, that Viacom's internal review process was outside the industry norm and contrary to their expectations as representatives of their respective railroad employers, and that it was not fair for Viacom to surreptitiously review applications and appropriate sites.

It was within the District Court's discretion to admit the testimony of Twidle and Schneider: they had personal knowledge of the railroad billboard industry, their testimony was helpful to a clear understanding of the facts and issues presented in the case, and their testimony did not involve specialized scientific or technical knowledge. See *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1005 (8th Cir. 1986) (concluding that railroad executives' lay-opinion testimony was admissible because it was based on their "knowledge derived from supervising railroad

operations, years of experience in the industry, and review of employee accident reports prepared in the ordinary course of business"). Furthermore, we agree with Plaintiffs that this testimony was properly admitted to refute the testimony of Viacom witnesses who opined that Viacom's review process was permissible under the terms of Viacom's contracts with the railroads. See *Gossett v. Weyerhaeuser Co.*, 856 F.2d 1154, 1156 (8th Cir. 1988) (noting district court's discretion to permit a plaintiff to negate in rebuttal, as opposed to case in chief, facts and theories raised by defense). The District Court's decision to admit Twidle and Schneider's lay-opinion testimony was not an abuse of its considerable discretion.

Viacom also challenges the District Court's decision to permit site applicants other than Plaintiffs to testify regarding their experiences with Viacom during the application process. Viacom argues that this evidence was irrelevant and unfairly prejudicial. We disagree. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "A district court is afforded wide latitude in determining issues of relevancy . . . ." *Suggs v. Stanley*, 324 F.3d 672, 682 (8th Cir. 2003).

John Lockridge, Nathan Simmons, Steve Anderson, and Joseph Murray, each a billboard business owner, testified that their applications for railroad billboard sites were subjected to the same undisclosed internal review process that Viacom conducted on Plaintiffs' site applications.[5] Lockridge testified that after Viacom failed to explain the delay in processing his site applications, he contacted Norfolk Southern railroad directly and only then learned that the railroad had approved his applications months earlier. Plaintiffs proffered copies of Lockridge's site applications on which a Viacom employee had noted, "Atlanta has interest. Atlanta to research" the sites identified by Lockridge. Tr. at 945-46. Simmons testified that he applied to Viacom for six sites on property in Georgia owned by CSX railroad, but was informed by Viacom that permits had already been issued to another applicant for five of those six sites. When Simmons later researched the sites with the Georgia Department of Transportation, he discovered that no permits had been issued. In fact, CSX had approved four of Simmons's site applications, but Viacom had not notified Simmons that he had received railroad approval. Consequently, Simmons testified, he was prevented from building on those sites. Anderson testified that he submitted applications to Viacom for three railroad billboard sites in October 2001. Viacom reviewed those applications and thereafter obtained permission from the railroad to construct a billboard that effectively "spaced out" two of the sites identified by Anderson. Murray testified that he applied to Viacom's predecessor for two billboard sites along Amtrak property in Boston. Once Viacom took over, Murray's applications were stalled, and when Murray contacted Amtrak officials for an explanation, he was

told that Viacom officials had instructed Amtrak officials "not to talk" to Murray about the applications. Id. at 1271. After Murray filed a lawsuit against Amtrak and Viacom, his applications were approved, and Murray dropped his lawsuit.

The District Court rejected Viacom's objections that this testimony was irrelevant and unfairly prejudicial. We likewise reject Viacom's arguments. In short, the District Court was in the best position to determine the relevance and potential prejudice of the evidence regarding Viacom's conduct in processing the applications submitted by Lockridge, Simmons, Anderson, and Murray, and we cannot say that the court abused its considerable discretion by admitting this testimony.

C. Damages Issues--Fraud. Viacom next argues that because Plaintiffs failed to satisfy the elements necessary to recover on a benefit-of-the-bargain damages theory, the damages awarded by the jury on Plaintiffs' fraud claims were not recoverable as a matter of law. Plaintiffs respond that Viacom misstates their theory of recovery and thereby misconstrues the basis on which the jury's damages award rests.

The District Court based its damages instruction on Missouri Approved Jury Instruction (MAI) 4.01, which states:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain

in the future] as a direct result of the occurrence mentioned in the evidence.

Mo. Supreme Court Comm. on Jury Instructions, Missouri Approved Jury Instructions 48 (Stephen H. Ringkamp & Richard E. McLeod eds., West 6th ed. 2002) (footnote omitted).

Viacom correctly notes that in a case alleging fraud, a court typically charges the jury with a benefit-of-the-bargain instruction--described in MAI 4.03--as the correct measure of damages. See *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988); see also *Leisure Resort Tech., Inc. v. Trading Cove Assocs.*, 277 Conn. 21, 889 A.2d 785, 793 (Conn. 2006). What Viacom fails to note, however, is that the use of other measures of damages may be permitted where the peculiar circumstances of the fraud make benefit-of-the-bargain damages an inadequate or inappropriate measure. See *Cent. Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220 (8th Cir. 1982) (applying Missouri law), cert. denied, 459 U.S. 1204, 103 S. Ct. 1191, 75 L. Ed. 2d 436 (1983); *Schroeder v. Zykan*, 255 S.W.2d 105, 110-11 (Mo. Ct. App. 1953); *Kilduff v. Adams, Inc.*, 219 Conn. 314, 593 A.2d 478, 480, 483 (Conn. 1991) (affirming award of "economic damages" on fraud claim where plaintiffs did not pursue options to protect home from foreclosure because defendant lienholder said he did not intend to foreclose and noting that plaintiff was entitled to recover consequential damages resulting directly from fraud). The District Court did not instruct the jury on benefit-of-the-bargain damages because, according to Plaintiffs, they did not proceed on a benefit-of-the-bargain theory. Rather, the court instructed the jury to award fair and just compensation for the harm suffered

by Plaintiffs on account of Viacom's culpable conduct. If Viacom believed that the court's damages instruction was an improper statement of Plaintiffs' theory of recovery or was otherwise in error, it was Viacom's obligation to object--and Viacom did not do so.[6] Fed. R. Civ. P. 51(d)(1)(A) (noting that a party may assert an instructional error only if that party "properly objected"); *Dupre v. Fru-Con Eng'g Inc.*, 112 F.3d 329, 334 (8th Cir. 1997) ("Our law on this subject is crystal clear: to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record."). We perceive no error in the District Court's instructions to the jury on Plaintiffs' damages claim.

Viacom faults the admission of Plaintiffs' testimony regarding the monetary effect of Viacom's conduct on their businesses. Specifically, Viacom contends that the District Court improperly permitted Plaintiffs to testify about the value of the billboards they were prevented or restricted from erecting as a result of Viacom's fraudulent conduct. Testimony on this subject, according to Viacom, requires specialized, expert knowledge. We have considered Viacom's arguments and find them unpersuasive. A district court's evidentiary rulings are entitled to substantial deference, so we review such rulings only for abuse of discretion. *Wactor*, 27 F.3d at 350; see *Spencer v. Young*, 495 F.3d 945, 950 (8th Cir. 2007) (noting that federal evidentiary rules provide standards for admissibility of evidence in diversity cases). A business owner may be permitted to testify to the damage he perceives has been done to his business as the result of another's actions. See e.g., *BBSerCo, Inc. v. Metrix Co.*,

324 F.3d 955, 963 (8th Cir. 2003) (concluding that district court did not abuse its discretion by admitting damages testimony from business owner with thirteen years' experience in industry). Viacom had the opportunity to present its own evidence to refute the Plaintiffs' damages evidence. See, e.g., *Spencer v. Stuart Hall Co.*, 173 F.3d 1124, 1128 (8th Cir. 1999) ("Where conflicting evidence is presented at trial, it is the jury rather than this court which assesses the credibility of the witnesses and decides which version to believe."). Moreover, as discussed above, Viacom did not object to the District Court's jury instruction regarding the calculation of damages. In sum, we believe that Plaintiffs presented a submissible case on the issue of damages related to their fraud claims and that there was ample evidence presented at trial to support Plaintiffs' fraud theories. The District Court did not err in its instructions to the jury on the calculation of damages, and the jury's damages award was supported by the evidence.

D. Tortious-Interference Issues. Viacom next argues that Plaintiffs' tortious-interference claims amount to impermissible contentions that Viacom interfered with its own contracts.[7] The District Court instructed the jury that Plaintiffs could prevail on their tortious-interference claims only if they proved that (1) each had a valid reasonable prospect of obtaining permission to build, sell, or lease billboards on railroad property; (2) Viacom was aware of each Plaintiff's expectation or opportunity; (3) Viacom unjustifiably interfered with each Plaintiff's expectation or opportunity; and (4) each Plaintiff suffered damages as a result. Instr. No. 35. Viacom did not object to this instruction at trial, and Viacom does not attempt to raise such an objection on

appeal. Rather, Viacom argues that the evidence was insufficient to support the jury's verdict on this claim. [8] As noted previously, we will reverse a jury's verdict only if, "after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict" for Plaintiffs. *Ryther*, 108 F.3d at 836.

Contrary to Viacom's assertions, Plaintiffs were not seeking a business relationship with Viacom, except to the extent that Plaintiffs expected Viacom to fulfill its role as an agent of the railroads, forward Plaintiffs' site applications to the appropriate railroad for consideration, inform Plaintiffs of the railroad's decision, and issue any necessary permits in conformance with the railroad's approval of the proposed site. Plaintiffs were seeking business relationships with the railroads--the actual owners of the property on which Plaintiffs wished to obtain permission to construct billboards. Plaintiffs' evidence established that Viacom misled them into believing that Viacom--an agent of the railroads--employed the industry-standard first-come, first-served method for processing applications when, in fact, Viacom was surreptitiously reviewing site applications, improperly delaying action on those applications, and appropriating those billboard sites that Viacom considered financially or strategically desirable. The evidence supported the jury's finding that Viacom recognized the commercial potential in the sites identified by Plaintiffs and, in an effort to exploit that potential, prevented or delayed Plaintiffs from obtaining permission to construct billboards on those sites. Viacom argues that Plaintiffs failed to identify a single potential purchaser or advertiser for the billboards Plaintiffs sought

permission to construct. In both Missouri and Connecticut, however, all that is required is proof of a *reasonable probability or expectancy* of entering into a business relationship--as opposed to an actual business relationship--to establish the proof necessary to support a tortious-interference claim. See *Am. Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1143 (8th Cir. 1986) (applying Missouri law); *Dreamcatcher Software Dev., LLC v. Pop Warner Little Scholars, Inc.*, 298 F. Supp. 2d 276, 287 (D. Conn. 2004) (applying Connecticut law). Plaintiffs satisfied their burden of proof.

Viacom also argues that pursuant to the jury instructions, Plaintiffs had to prove that Viacom was aware of a Plaintiff's intent to *build* on a particular site. According to Viacom, proof that Viacom was aware of a Plaintiff's intent to *resell* a site to a third party rather than construct a billboard itself was inadequate to prove tortious interference. We reject this argument. The jury was instructed to return a verdict for Plaintiffs on their tortious-interference claim if Plaintiffs had a valid business expectation or opportunity "to gain financial benefits from *leasing or selling* the proposed billboard sites." Instr. No. 35 (emphasis added). The jury reasonably concluded that Plaintiffs satisfied this element of their claim. Based on our review of the record, we cannot fault this conclusion.

In short, Plaintiffs presented sufficient evidence for a reasonable jury to conclude that had Viacom properly fulfilled its role as an agent of the railroads, Plaintiffs would have had a reasonable opportunity to enter into a business relationship with the railroads to construct billboards on the sites at issue. Accordingly, we decline

to reverse the jury's verdict on Plaintiffs' tortious-interference claim.

E. Unfair-Competition Issues. Viacom contends that Plaintiffs failed to prove the elements of their unfair-competition claim, namely, that Plaintiffs communicated a trade secret to Viacom, Viacom was in a position of trust and confidence with Plaintiffs, and Viacom used the trade secret, thereby causing Plaintiffs damage. Instr. No. 37. Again, Viacom asks us to reverse the jury's verdict, an extreme remedy that we will grant only if, after viewing the evidence in the light most beneficial to Plaintiffs, we conclude that no reasonable jury could have returned a verdict in Plaintiffs' favor. See *Ryther*, 108 F.3d at 836.

According to Viacom, Plaintiffs and Viacom were engaged in arm's-length business relationships with respect to the billboard sites at issue. Therefore, Viacom was not in a position of trust and confidence with Plaintiffs and their claims must fail. We disagree with Viacom's characterization of its relationship with Plaintiffs. As discussed above, Plaintiffs interacted with Viacom as a matter of necessity because Viacom represented itself as the agent of the railroads for billboard-construction permits. Plaintiffs reasonably relied on Viacom to treat their site applications in good faith, forward those applications to the railroads in a timely fashion, notify Plaintiffs of a railroad's decision, and issue any necessary permits in accordance with that railroad's decision. See *Steinberg v. Fleischer*, 706 S.W.2d 901, 908 (Mo. Ct. App. 1986) (reasoning that parties were "experienced businessmen" and did not have a fiduciary relationship); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 761 A.2d 1268, 1279-80

(Conn. 2000) (defining an arm's-length business relationship as lacking a relationship of dominance and dependence). Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the evidence was sufficient for a reasonable jury to find that Viacom was in a position of trust and confidence with Plaintiffs with respect to the site applications.

Viacom next argues that Plaintiffs failed to prove that they communicated trade secrets when they identified their proposed billboard sites in applications submitted to Viacom. Rather, according to Viacom, these sites were public knowledge easily identifiable by any billboard-industry professional. While it may be true that easily ascertainable information does not constitute a trade secret, see *W. Forms, Inc. v. Pickell*, 308 F.3d 930, 933-34 (8th Cir. 2002) (applying Missouri law); *Town & Country House & Homes Serv., Inc. v. Evans*, 150 Conn. 314, 189 A.2d 390, 393 (Conn. 1963), the testimony in this case was sufficient for the jury to conclude that a billboard professional discovers desirable urban billboard sites on railroad property only after extensive, time-consuming research and such information is entitled to protection. Viacom also argues that Plaintiffs made no effort to maintain the secrecy of their billboard sites because Plaintiffs disclosed the locations of those sites in their applications. This argument is without merit. Plaintiffs disclosed the site locations because they were required to do so in order to obtain permission to construct billboards on those sites. Viewing the evidence in the light most favorable to Plaintiffs, we cannot say that the evidence was insufficient for a reasonable jury to find that Plaintiffs communicated trade secrets in their

applications to Viacom for the railroad billboard sites at issue.

Viacom also argues that Plaintiffs' unfair-competition claims fail because Viacom did not "use the I-84 and I-670 sites in any way, let alone to cause Plaintiffs harm." Br. of Viacom at 55. We disagree. The evidence was sufficient to establish that Viacom "used" the billboard sites identified by Plaintiffs by, among other things, constructing Viacom billboards on those sites, delaying notification to Plaintiffs after a railroad approved a proposed site, or "spacing-out" Plaintiffs' proposed sites by constructing billboards nearby. The jury found that these wrongful activities caused Plaintiffs to suffer economic damage. The jury heard Viacom's evidence to the contrary that, for example, a "logjam" of pending applications at BNSF caused delay in processing applications, that Plaintiffs' failure to comply with local billboard-spacing regulations caused the denial of their applications, and that Derench's alleged forgery in a state license application caused him to lose one of the sites he identified. Having heard all the evidence, the jury elected to credit Plaintiffs' testimony over Viacom's on these issues. See *Spencer*, 173 F.3d at 1128 (noting that the jury, not this court, resolves conflicts in evidence). Mindful of our extremely deferential standard of review for jury verdicts, we cannot say that the jury's verdict on Plaintiffs' unfair-competition claim was unsupported by the evidence.

F. Punitive-Damages Issues. Viacom raises a number of claims with respect to the jury's award of punitive damages. First, Viacom argues that the punitive-damages award must be reversed because there was no evidence of an "evil motive" on Viacom's part. The

instructions required, however, that Plaintiffs prove conduct that was "outrageous" *either* "because of [Viacom's] evil motive" *or*because of Viacom's "reckless indifference to the rights of others." Instr. No. 50. The jury was presented with substantial evidence to support its findings that Viacom, allegedly acting in its capacity as an agent for the railroads, either 1) fraudulently represented to Plaintiffs that their applications would be processed on a first-come, first-served basis or 2) failed to disclose to Plaintiffs--or even flatly denied--that Viacom would review Plaintiffs' applications and potentially appropriate the sites identified therein. Plaintiffs also presented evidence sufficient for a jury to conclude that Viacom engaged in this conduct for its financial and strategic benefit. The evidence of Viacom's outrageous conduct in pursuit of its scheme was sufficient for a reasonable jury to award punitive damages.

Next, Viacom contends that under Connecticut law, Patriot could not recover punitive damages because it failed to prove that a managerial-level Viacom employee engaged in culpable conduct. See *Stohlts v. Gilkinson*, 87 Conn. App. 634, 867 A.2d 860, 867-68 (Conn. Ct. App. 2005) (noting that an employer may be liable for punitive damages if a managerial-level employee engages in or approves of an outrageous act). Here, both Wally Kelly, the President of Viacom, and Harold Gustin, a Senior Vice President of Viacom's Land-Lease Division, conceded that the railroad billboard industry generally processes site applications on a first-come, first-served basis. Kelly and Gustin also testified that Viacom's adoption of the review process amounted to an internal business decision that Viacom was not required to share with site applicants. Kelly

testified that he implemented the application review process in 2002 and that he believed the review process was appropriate and permissible under Viacom's contracts with the railroads. Gilley testified that he forwarded for review a list of billboard sites originally identified in third-party applications "in accordance with [Kelly's] directive that the local markets be given a chance to review them for Viacom's use." Tr. at 85 (quoting memo from Gilley to Viacom employees forwarding BNSF sites identified in applications received by Viacom). This evidence was sufficient to establish that at a minimum, local-office managerial-level employees engaged in or condoned the conduct required to support a punitive-damages award.

Viacom also argues that Patriot cannot recover punitive damages because it failed to present evidence of its litigation expenses to the jury as required under Connecticut law. See *Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (citing Connecticut law under which punitive damages recoverable in some circumstances but are limited to the plaintiff's litigation expenses). Over Viacom's objections, the District Court allowed Patriot to present evidence of its litigation expenses to the court after the jury had returned its verdict. Patriot's counsel attempted to introduce litigation-expense evidence during the trial, but the court ruled that it would allow such evidence "at some time, maybe even after the jury has gone out to deliberate, because it doesn't go to the jury. It just has to be in evidence in the plaintiffs' case." Tr. at 1733. There was additional discussion and legal argument among counsel and the court, and Viacom's counsel ultimately stated that the court's "approach [was] just fine." Tr. at 1735. Because Viacom acquiesced in the

District Court's approach to the introduction of evidence on Patriot's litigation expenses and did not object, Viacom has waived this argument on appeal. See *Evergreen Invs., LLC v. FCL Graphics, Inc.*, 334 F.3d 750, 757 (8th Cir. 2003) (reiterating that a "party may not stand idly by, watching the proceedings and allowing the district court to commit an error on which the party subsequently complains" (citation to quoted case omitted)).

Finally, Viacom argues that the punitive damages awarded by the jury are unconstitutionally excessive. The jury awarded $ 1,044,445 in punitive damages each to Craig Outdoor and Midwest Outdoor, an amount that is eight times the actual damages of $ 125,000 awarded to each Plaintiff. We review de novo a district court's determination regarding the constitutionality of a punitive damages award. *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048 (8th Cir. 2002). In deciding whether a punitive damages award is so excessive that it violates due process, we consider the reprehensibility of the defendant's conduct, the disparity between the plaintiff's harm and the punitive damages award, and the difference between the punitive damages award and the civil penalties imposed in comparable cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The most important of these factors is the reprehensibility of the defendant's conduct. Id. Here, we agree with the District Court that Viacom's conduct was particularly egregious, characterized as it was by "repeated trickery and deceit," with evidence indicating "an enormous company's intent to defraud Plaintiffs because of their limited financial abilities." Order of Dec. 14, 2005, at 10. Although a ratio of actual to

punitive damages in excess of eight to one may be constitutionally suspect, "there are no rigid benchmarks that a punitive damages award may not surpass." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). We conclude that in this case, given Viacom's deceitful conduct directed at Plaintiffs, the single-digit multiplier comports with due process.[9] Cf. id. ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). In sum, we find no constitutional impediment to the enforcement of the punitive damages award as ultimately determined by the District Court.

II. PLAINTIFFS & MASSOOD

A. Damages Issues. Having addressed Viacom's arguments on appeal, we turn now to Plaintiffs' and Massood's arguments on cross-appeal. Plaintiffs first contend that the District Court erred by refusing to harmonize the damages awards to reflect the jury's true intentions. The verdict forms provided separate blank lines on which to indicate the actual damages awarded to each Plaintiff under each theory of recovery, but the form did not provide a separate blank line on which to indicate the *total* actual damages awarded to each Plaintiff. The jury returned identical verdicts against Viacom on each Plaintiff's three state-law claims (fraud, tortious interference, and unfair competition), and the jury assessed identical actual damages under each of the three theories asserted by each Plaintiff: $ 125,000 for Craig, $ 125,000 for Midwest, and $ 80,000 for Patriot.[10]

After the verdict was returned, Viacom filed a motion seeking formation of the judgment, arguing that because there was a single indivisible injury in the case--the value of the lost and appropriated billboard sites--"entering judgment on the jury's separate damages findings would create impermissible double recovery for Plaintiffs." Defendants' Motion Regarding Formation of Judgment at 1. Plaintiffs filed a response to Viacom's double-recovery arguments, including affidavits they had obtained from each juror to "clear[] up any possible ambiguity created by the form of the verdict." Plaintiffs' Statement Concerning the Jury's Verdict and Motion for Final Judgment at 1. Plaintiffs argued that the verdict forms confused the jury and caused it to mistakenly apportion the total actual damages for each Plaintiff across all three theories each Plaintiff asserted. To give the jury's true intentions effect, the damages amount noted for each separate theory of recovery must be totaled. For example, as to the verdict for Craig Outdoor, Plaintiffs asserted that the jury intended to award actual damages of $ 125,000 for *each* of Craig's state-law theories for a total recovery of $ 375,000. The District Court refused to consider the juror affidavits and rejected Plaintiffs' arguments. Instead, the court entered judgment for total actual damages on the state-law claims in the following amounts: $ 125,000 for Craig Outdoor; $ 125,000 for Midwest Outdoor; and $ 80,000 for Patriot. Plaintiffs appeal this result.

We first address the issue of the juror affidavits. Plaintiffs' counsel obtained these affidavits after the jury was discharged, without notice to opposing counsel, and without permission from the District Court. A district court is generally prohibited from

receiving testimony from jurors after the jury has returned a verdict and has been discharged. Fed. R. Evid. 606(b); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 73 (8th Cir. 1989). A district court may, however, consider juror testimony that because of some oversight or mistake, the verdict announced at trial was not the verdict on which the jurors had agreed. *Karl*, 880 F.2d at 74. In other words, "[t]he admission of a juror's testimony is proper to indicate the possibility of a 'clerical error' in the verdict, but not the 'validity' of the verdict." *Id.* (citation to quoted case omitted). Clerical error might involve, for example, a transposed number in the damages amount set forth on the verdict form. Here, Plaintiffs' charges of mistake or ambiguity in the verdict form cannot be characterized as clerical error. Instead, the affidavits obtained by Plaintiffs purport to explain what the jury meant by its verdict and how the jury determined what numbers to transcribe onto the verdict forms. See id. The District Court did not err in refusing to consider the juror affidavits.

We next address Plaintiffs' assertions that the District Court erred by refusing to harmonize the jury's damages awards. If, as here, a party asserts alternative theories of recovery for the same injury, that party may not recover compensatory damages under each legal theory. Rather, he is only entitled to one compensatory damage award if liability is found on any or all of the theories asserted. *Cole v. Control Data Corp.*, 947 F.2d 313, 320-21 (8th Cir. 1991) (applying Missouri law). The parties agree that each Plaintiff asserted three state-law theories of relief for a single injury: the harm caused by Viacom's scheme to defraud Plaintiffs out of billboard sites identified in applications submitted to

Viacom. Whether the harm caused by Viacom's scheme was the result of fraudulent misrepresentation or omission, unfair competition, tortious interference, or some combination thereof, the parties agree that there is only a single indivisible injury to each Plaintiff and that there may be only a single recovery awarded to each Plaintiff. See *Sellers v. Mineta*, 350 F.3d 706, 713-14 (8th Cir. 2003) ("The law in Missouri is that a plaintiff may not recover duplicate damages for the same harm."); *Mahon v. B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 935 A.2d 1004, 1015 (Conn. 2007) ("Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once." (citation to quoted cases omitted)).

We agree with the District Court that "[f]rom the face of the verdict forms," the jury intended to award total actual damages of $ 125,000 to Craig Outdoor and Midwest Outdoor and $ 80,000 to Patriot for their respective state-law claims. Order of Dec. 14, 2005, at 4. Nothing in the jury instructions or the verdict forms directed or permitted the jury to allocate the total actual damages amount awarded to a Plaintiff among that Plaintiff's three state-law claims. "Absent evidence to the contrary we presume the jury followed the instructions it was given." *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8th Cir. 2004). And we are not persuaded by Plaintiffs that "the only logical and consistent" reading of the verdict forms requires a conclusion that the jury allocated the total actual damages among each Plaintiff's three state-law claims. Br. of Appellees at 71. We likewise reject Plaintiffs' argument that the verdict forms--forms, we note, that were proposed by Plaintiffs and adopted by the court--

confused the jury and caused it to improperly allocate the actual damages awards. "[M]ere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict." *Gander v. FMC Corp.*, 892 F.2d 1373, 1379 (8th Cir.), cert. denied, 498 U.S. 878, 111 S. Ct. 209, 112 L. Ed. 2d 169 (1990). In sum, we conclude that the District Court did not err in rejecting Plaintiffs' calls to harmonize the jury's actual damages awards on Plaintiffs' state-law claims.

Patriot argues that the District Court erred by capping its punitive-damages award at $ 50,000. According to Patriot, the punitive-damages award is insufficient to make it whole as required by Connecticut law because Patriot's obligation under its contingency-fee arrangement with its attorneys--forty percent of Patriot's total recovery plus expenses--exceeds the sum of Patriot's share of the RICO-damages award plus the $ 50,000 punitive-damages award after imposition of the cap. Thus, Patriot argues, because it owes more in attorney fees than it will recover, the punitive damages permitted by the District Court are insufficient under Connecticut law. Viacom counters that the District Court properly set the punitive-damages cap because Connecticut law allows a court to award reasonable attorney fees no matter the terms of a contingency-fee agreement. See *Ham v. Greene*, 248 Conn. 508, 729 A.2d 740, 756 (Conn.) (affirming district court's punitive damages award even though amount was less than that calculated under contingency-fee agreement), cert. denied, 528 U.S. 929, 120 S. Ct. 326, 145 L. Ed. 2d 254 (1999); *Berry v. Loiseau*, 223 Conn. 786, 614 A.2d 414, 437 (Conn. 1992) (concluding that court was not bound

by contingency-fee agreement in calculating punitive damages under state statute).

We conclude that the District Court abused its discretion in setting the cap on Patriot's punitive-damages award at an amount that is insufficient to cover its litigation expenses as expressed in the contingency-fee agreement. In *Schoonmaker v. Laurence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64, 104-05 (Conn. 2005), the Connecticut Supreme Court held that if a contingency fee "agreement is, by its terms, reasonable, the trial court may depart from its terms only when necessary to prevent 'substantial unfairness' to the party . . . who bears the ultimate responsibility for payment of the fee." On the other hand, if the trial court determines that the fee agreement is unreasonable on its face, the court "may exercise its discretion and award a reasonable fee in accordance with the factors enumerated in rule 1.5(a) of the Rules of Professional Conduct." *Id.* at 105. As we explain below, the RICO damages awarded by the jury to Patriot have been eliminated from the attorney-fees computation, and this result will likely affect the District Court's determination of the punitive-damages award. Accordingly, we reverse the judgment awarding Patriot $ 50,000 in punitive damages, and we remand to the District Court for reconsideration of this issue in light of our decision.

B. Massood Issues. Massood argues that the District Court erred in granting Viacom's motion to dismiss his RICO and state-law claims. We review de novo the District Court's order granting Viacom's motion to dismiss, affirming only if Massood can prove no set of

facts that would entitle him to relief. *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).

Massood's claims were based on the following events: In the summer of 1997, Viacom approached Massood about acquiring his billboard corporation, Wilson-Curtis. Before the acquisition was finalized, Massood, on behalf of Wilson-Curtis, filed three billboard site applications with Viacom. According to Massood, Viacom fraudulently denied these applications, thereby diminishing the value of, and the price Viacom paid for, Wilson-Curtis. The acquisition was completed on January 21, 1999. Thereafter, Massood filed these RICO and state-law claims against Viacom "to recover the loss he suffered as a result of the lost value in the Wilson-Curtis shares he owned." First Amended Complaint at 14.

The District Court dismissed Massood's claims, noting that "a shareholder lacks standing to sue for injury to a corporation because the shareholder suffers only derivatively" through the decreased value of his investment. Order of July 21, 2004, at 2. A shareholder generally may not sue on his own behalf--under Missouri law or RICO--to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action. See *Peterson v. Kennedy*, 791 S.W.2d 459, 464 (Mo. Ct. App. 1990) (observing that diminution in stock value must be addressed in a derivative shareholders suit; shareholders may not sue individually to "recover their proportionate share of money alleged to have been wrongfully taken from the corporation"); *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992) (noting

that a shareholder may not maintain a RICO action for injury to a corporation that resulted in the diminution in value of his shares without individual and direct injury to the shareholder); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), cert. denied, 479 U.S. 987, 107 S. Ct. 579, 93 L. Ed. 2d 582 (1986) (same).

Massood argues that in the circumstances of this case, "[e]quity demands a different standing rule . . . [because] the fraudulent activity of the alleged wrongdoer (Viacom) enabled it to buy the tort victim corporation (Wilson-Curtis)" at a reduced price. Br. of Appellees at 89. In support of this contention, Massood cites several cases, but in none of those cases did the court permit the shareholder to recover individually for derivative claims. Rather, in those cases, the court permitted the shareholder, who continued to own shares in the surviving corporation, to pursue a derivative claim on behalf of the corporation that was acquired in the merger. See *Blasband v. Rales*, 971 F.2d 1034, 1046 (3d Cir. 1992) (applying Delaware law and holding that plaintiff who was a shareholder in surviving corporation could sue derivatively on behalf of its merged parent corporation); *Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990) (holding that in federal securities-law case, shareholder in surviving parent corporation had standing to pursue claims on behalf of merged subsidiary corporation); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988) (allowing shareholders to maintain a derivative action on behalf of merged entity and separate individual actions) (superseded by statute); *Miller v. Steinbach*, 268 F. Supp. 255, 268-69 (S.D.N.Y. 1967) (holding that plaintiff who was a

shareholder in surviving corporation had "capacity to sue derivatively on behalf of" company that was merged into the surviving company).

We are not persuaded that in the circumstances of this case, equity demands that we permit Massood to assert his admittedly derivative claims for individual recovery. In several analogous situations, courts have refused to extend a derivative-standing exception to allow a shareholder (or former shareholder) to pursue *individually* claims that for some reason he could not have pursued derivatively. See, e.g., *Warren v. Mercantile Bank of St. Louis*, N.A., 11 S.W.3d 621, 623 (Mo. Ct. App. 1999) (holding that misrepresentation "claims based upon an agreement between two corporations and/or statements made to the officers or sole shareholders of a corporation belong to the corporation, not the individual officers or sole shareholders"; shareholder could not pursue individual claims for damages); *Rand*, 794 F.2d at 849 (concluding that shareholders who alleged that creditor violated RICO by forcing corporation's involuntary bankruptcy lacked standing to sue creditor because legal injury, if any, was to corporation/bankruptcy trustee and not to shareholders); *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 550-52 (S.D.N.Y. 2000) (concluding that shareholder lacked standing to assert derivative RICO claim in individual capacity, even though he could not bring the claim derivatively because he no longer owned shares in the company); *Small v. Sussman*, 306 Ill. App. 3d 639, 713 N.E.2d 1216, 1221, 239 Ill. Dec. 366 (Ill. Ct. App. 1999) (reiterating that under Illinois law, if an alleged injury is to the corporation, any lawsuit must be brought on the corporation's behalf; fact that the

corporation had been sold and was part of another entity did not change the derivative requirement).

Thus, several courts have held that a shareholder lacks standing to pursue derivative claims individually even where, as in this case, the shareholder could not have pursued a derivative action because he no longer held stock in the allegedly injured company or he was otherwise barred from bringing a derivative suit. We cannot say that the District Court erred in reaching a similar conclusion in the circumstances of this case. We are not suggesting that we may never be presented with a case in which equity demands an exception to the derivative-standing rule, but this is not such a case.[11] The District Court did not err in granting Viacom's motion to dismiss Massood's RICO and state-law claims against Viacom for lack of standing.

C. RICO Issues--Viacom. We now turn to Plaintiffs' arguments that Viacom violated RICO. Plaintiffs alleged that Viacom formed three separate RICO association-in-fact enterprises with the BNSF, KCS, and B&M railroads "for the purpose of defrauding the plaintiffs and other small billboard businesses and their owners," in violation of RICO. Complaint at 33. Plaintiffs further asserted that while such associations in fact were "enterprises" as defined in RICO, each railroad was merely an innocent member of its respective enterprise.

The District Court granted Viacom's motion for summary judgment on these claims, concluding that "for an association of individuals to constitute an 'enterprise' for purposes of RICO, the individuals must share a common purpose to engage in a particular

fraudulent course of conduct and work together to achieve such purposes." Order of May 25, 2005, at 4 (emphasis added) (quoting *Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc.*, 62 F. Supp. 2d 544, 551 (D. Conn. 1998)). Recognizing that our Court has never directly held that the members of a RICO association-in-fact enterprise must share a common *fraudulent* purpose, the District Court was nevertheless persuaded by other courts that have so held. See, e.g., *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004) (noting that an association-in-fact enterprise "must share a common purpose to engage in a particular fraudulent course of conduct" (citation to quoted case omitted)), cf. *United States v. Cianci*, 378 F.3d 71, 83, 88 n.9 (1st Cir. 2004 (reasoning that the common purpose among members of an association-in-fact enterprise under RICO need not be fraudulent). We need not decide whether the common purpose under RICO must be fraudulent to affirm the District Court's dismissal of Plaintiffs' RICO claims against Viacom, however, because we conclude that Plaintiffs have failed to establish that the alleged association-in-fact enterprises shared a common purpose of any kind--fraudulent or otherwise.

We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. *Larson v. Kempker*, 414 F.3d 936, 939 (8th Cir. 2005). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. We may affirm on any ground supported by the record. *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 674 (8th Cir. 2001).

RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). RICO allows a private party who has been injured in his property to sue for damages, id. § 1964(c), recovering only if he can show: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (footnote omitted). An "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

"The existence of an enterprise at all times remains a separate element which must be proved by the" plaintiff in order to establish a RICO violation. *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Proving the existence of an enterprise requires "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." Id. "[A]lthough much about the RICO statute is not clear, it is very clear that those who are 'associate[s],' 18 U.S.C. § 1962(e), of a criminal enterprise must share a 'common purpose.'" *Ryan v. Clemente*, 901 F.2d 177, 180 (1st Cir. 1990); see, e.g., *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989).

Plaintiffs argue that the common purpose shared by Viacom and each of the railroads was "leasing property owned by the railroad to outdoor billboard businesses." Second Amended Complaint at 34. We disagree with

this characterization. Viacom's purposes and the railroads' purposes were not sufficiently aligned under the facts of this case to prove the existence of a RICO enterprise. By Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom. Plaintiffs described several instances in which Viacom's conduct resulted in sites being "spaced out" by billboards erected on neighboring property, thus preventing the affected railroad from ever benefitting from a billboard located on its property. It is unlikely that the railroads would cooperate with Viacom to achieve this goal. Plaintiffs also described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits. We cannot conceive how this goal was shared by any of the railroads, which presumably did not care who held the license for a particular billboard site as long as fees were paid. Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets. Again, this goal would appear to be Viacom's alone, since competition for billboard sites on railroad property would presumably be in the railroads' best interests. In short, the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a "common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. And "divergent goals" among members of a purported association-in-fact enterprise is a "fatal problem" to a RICO claim. See *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir.), cert. denied, 543 U.S. 956, 125 S. Ct. 412, 160 L. Ed. 2d 318 (2004). The

District Court did not err in granting Viacom's motion for summary judgment on Plaintiffs' RICO claims.

III. KELLY AND GUSTIN

We now address arguments raised by Kelly and Gustin regarding the RICO verdicts the jury returned against them. Kelly and Gustin argue that Plaintiffs failed to prove the essential elements of the RICO claims made against them individually and that the District Court therefore should not have allowed these claims to go to the jury. Instead, they argue, given the fatal deficiencies in these RICO claims, the District Court should have granted their separate motions for judgment as a matter of law. We review a district court's denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court. *Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop.*, 75 F.3d 1268, 1273 (8th Cir. 1996). Judgment as a matter of law following a jury verdict is appropriate only when "the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000), cert. denied, 532 U.S. 1008, 121 S. Ct. 1734, 149 L. Ed. 2d 659 (2001). In conducting our review, we consider the evidence in the light most favorable to the nonmoving party, here the Plaintiffs, giving that party the benefit of all favorable inferences that can reasonably be drawn from the evidence. See *Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007).

Like Plaintiffs' RICO claims against Viacom, Plaintiffs' RICO claims against Kelly and Gustin were predicated on violations of 18 U.S.C. § 1962(c), which requires proof of "(1) conduct (2) of an enterprise (3) through a

pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496 (footnote omitted). The requirements of § 1962(c) must be established as to each individual defendant. See, e.g., *id.* at 500 (noting that plaintiffs could maintain action if "the *defendants* conducted the enterprise through a pattern of racketeering activity") (emphasis added); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987) ("The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise."), cert. denied, 486 U.S. 1022, 108 S. Ct. 1995, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988). Failure to present sufficient evidence on any one element of a RICO claim means the entire claim fails. Cf. *Sedima*, 473 U.S. at 496. We focus on whether, assuming for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged, Plaintiffs' evidence was sufficient to establish that those predicate acts can be said to form a pattern of racketeering activity.

Even if we assume that Plaintiffs' evidence was adequate to support the jury's conclusion that Kelly and Gustin committed the necessary predicate acts of mail fraud and wire fraud, we hold that the evidence was insufficient to support the jury's conclusion that Kelly and Gustin engaged in a pattern of racketeering activity as is also necessary for RICO liability. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), the Supreme Court observed that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.' Continuity in this context refers "either to a

closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. To satisfy the RICO continuity element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence that the alleged predicate acts threaten to extend into the future (open-ended continuity). *Id.* at 242. A plaintiff may establish open-ended continuity by showing that the predicate acts themselves involve a distinct threat of long-term racketeering activity or that the predicate acts constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise. *Id.* at 242-43.

Here, the only theory advanced by Plaintiffs with respect to the continuity element was a theory of open-ended continuity. The jury was instructed, "Plaintiffs must prove that the acts of racketeering are related to each other and that they pose a threat of continued criminal activity." Instr. No. 21. Accordingly, Plaintiffs were required to show that the predicate acts of mail fraud and wire fraud committed by Kelly and Gustin "project[ed] into the future with a threat of repetition." *H.J. Inc.* 492 U.S. at 241. Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure--thereby fraudulently inducing Plaintiffs to submit applications--but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself. In January 2003, however, Viacom began routinely transmitting a standard form

letter to all site applicants notifying them that their applications were subject to review by Viacom. At that time, Viacom effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion. Because there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future, Plaintiffs' theory of RICO continuity, and thus their RICO claims against Kelly and Gustin, must fail.

We have in the past rejected attempts to convert ordinary civil disputes into RICO cases. See, e.g., *Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991) (noting that RICO was not intended to apply to "ordinary commercial fraud" (citation to quoted case omitted)). Although Plaintiffs have presented evidence sufficient to establish violations of state law, they have not presented sufficient evidence to satisfy the more onerous requirements of RICO. Having carefully reviewed the record, we hold that Plaintiffs failed to produce sufficient evidence of RICO violations by Kelly and Gustin. The jury verdict on Plaintiffs' RICO claims against Kelly and Gustin therefore cannot stand, and Kelly and Gustin are each entitled to judgment as a matter of law.

Our reversal of the jury's verdict awarding damages to Plaintiffs on their RICO claims against Kelly and Gustin requires that we now address the District Court's order awarding Plaintiffs attorney fees under RICO's fee-shifting provision. 18 U.S.C. § 1964(c). In its

attorney-fees order, the District Court found that because Plaintiffs' "state theories [were] so closely intertwined with the RICO claims," attorney fees "on the entire matter [were] compensable under the federal statute." Order of July 18, 2006, at 2 (citing *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773-74 (8th Cir. 2000). Because Plaintiffs are no longer prevailing parties for purposes of RICO's fee-shifting provision, they are no longer entitled to recover the attorney fees related to their RICO claims, and we therefore reverse the District Court's order awarding attorney fees on Plaintiffs' RICO claims against Kelly and Gustin.

As for Plaintiffs' state-law claims, Missouri and Connecticut both follow the "American" rule for determining whether an award of attorney fees is appropriate. See *Randolph v. Mo. Hwys & Transp. Comm'n*, 224 S.W.3d 615, 619 (Mo. Ct. App. 2007); *Ames v. Comm'r of Motor Vehicles*, 267 Conn. 524, 839 A.2d 1250, 1255 (Conn. 2004). Under the American rule, each party is generally required to bear the expense of his own attorney fees. Attorney fees may be awarded if they are "provided for by statute, contract or 'when needed to balance benefits in a court of equity.'" *Randolph*, 224 S.W.3d at 619 (citations to quoted case omitted); see *Ames*, 839 A.2d at 1250. Because the District Court's award of attorney fees was based not only on Plaintiffs' RICO claims but also on their "closely intertwined" state-law claims, we are unable to determine in the first instance what amount of that award, if any, Plaintiffs are entitled to with respect to their state-law claims. Accordingly, we remand the attorney-fee issue to the District Court for reconsideration in light of this opinion.

In addition, Plaintiffs argue that the District Court abused its discretion by neglecting to rule on their request for attorney fees for work performed by the Wyrsch Hobbs law firm. We agree with Plaintiffs that the court's inadvertent failure to rule on this request was an abuse of discretion, and we direct the District Court on remand to give initial consideration to attorney fees for the Wyrsch Hobbs firm.

IV. CONCLUSION

In conclusion, we affirm the District Court's judgment on the jury's verdict in favor of Plaintiffs on their state-law claims against Viacom; affirm the District Court's judgment dismissing all of Massood's claims against Viacom; affirm the District Court's summary judgment for Viacom on Plaintiffs' RICO claims; and reverse the District Court's judgment on the jury's verdict in favor of Plaintiffs on their RICO claims against Kelly and Gustin. In addition, we reverse the District Court's judgment awarding punitive damages in the amount of $ 50,000 to Patriot and attorney fees and expenses in the amount of $ 1,863,840 to Plaintiffs on their RICO claims against Kelly and Gustin. We remand the case to the District Court for reconsideration of the punitive-damages and attorney-fees issues in light of this opinion. This case is also remanded for initial consideration of the request for attorney fees for the Wyrsch Hobbs law firm.

Footnotes

[1]The jury rejected Plaintiffs' RICO claims against defendants Randall Romig and Randy Jackson, and Plaintiffs do not appeal from that verdict.

[2]Missouri residents Craig Outdoor, Midwest Outdoor, and Massood asserted their state-law claims under Missouri law; Patriot Outdoor, a Connecticut resident, asserted its state-law claims under Connecticut law.

[3]"Spaced out" as used in the billboard industry means that a particular billboard site is no longer viable due to its proximity to a later-constructed billboard or other structure.

[4]Viacom correctly notes that when one of two theories of liability has been erroneously submitted to the jury, a general verdict--as was returned in this case--cannot stand. See Dudley v. Dittmer, 795 F.2d 669, 673 (8th Cir. 1986). Because we have concluded that both fraud theories were properly submitted to the jury, however, we need not address Viacom's arguments regarding the general verdict.

[5]This evidence was relevant and admissible not only to support Plaintiffs' allegations of fraud, see *Norden v. Friedman*, 756 S.W.2d 158, 164 (Mo. 1988); *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 910 A.2d 209, 214 (Conn. 2006), but also to show a pattern of racketeering activity, a necessary element of Plaintiffs' RICO claims.

[6]Viacom objected to Jury Instructions 14, 16, 21, 22, 23, 24, 25, 27, 28, 31, 33, 35, and 37 but not to Instruction 48--the District Court's instruction on damages.

[7]Viacom suggests that the jury instruction on tortious interference required that Plaintiffs prove "a reasonable probability of obtaining permission from Viacom "to build, sell, or lease billboards. Br. of Viacom at 48. This characterization of the jury instruction is

incorrect. The instructions required Plaintiffs to show that they had "a reasonable prospect of obtaining permission to build billboards on the sites [they] identified in [their] applications." Instrs. 35, 36. The jury instructions did not require proof of permission "from Viacom."

[8]Because we have affirmed the jury's verdict on Plaintiffs' fraud claims, we need not address Viacom's arguments that the failure of Plaintiffs' fraud claims requires reversal of the jury's verdict on Plaintiffs' tortious-interference claims.

[9]Viacom cites our decision in *Eden Electric, Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004), cert. denied, 543 U.S. 1150, 125 S. Ct. 1322, 161 L. Ed. 2d 112 (2005), for its proposition that in a commercial case alleging particularly egregious behavior, a punitive-damages multiplier of roughly 4:1 is the constitutional maximum. We disagree with Viacom's contention that its behavior in this case was not particularly egregious, and we reject Viacom's argument that a 4:1 multiplier is the constitutional maximum in every commercial case. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

[10]Because we reverse the jury's verdict on Plaintiffs' RICO claims against Gustin and Kelly, we need not address Plaintiffs' arguments regarding the calculation of the RICO damages awarded pursuant to those verdicts.

[11]We note that Massood apparently knew about Viacom's alleged appropriation of the three Wilson-Curtis billboard sites roughly six months before he sold

his Wilson-Curtis shares to Viacom. Thus, it appears that Massood could have brought a derivative action on behalf of Wilson-Curtis prior to the sale of his shares. See *Lakonia Mgmt.*, 106 F. Supp. 2d at 551 n.20 (stating "no unfairness" in dismissing suit for lack of standing when former shareholder had knowledge of allegedly objectionable conduct before sale of shares and had opportunity to bring derivative action but did not).

5/25/2005
Case No. 04-0074-CV-W-DW
IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

ORDER

Pending before the Court is the Defendants' motion for summary judgment (Doc. 124). The Plaintiffs filed suggestions in opposition (Doc. 141),[1] and the Defendants filed a reply brief (Doc. 147). After reviewing the record and the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Defendants' motion for summary judgment.

I.[2]

As an initial matter, the Plaintiffs repeatedly argue that under the "law of the case" doctrine, the pending motion for summary judgment must be denied because the Court previously rejected the Defendants' motion to dismiss. See Plts.' Amend. Suggs. in Opp. at 1

(stating that the Defendants' "arguments should not be reconsidered here as the 'law of the case' doctrine instructs"). That argument is wrong as a matter of law. The Eighth Circuit has repeatedly recognized that "the doctrine of the law of the case is applicable only to final judgments, not to interlocutory orders." Muff Plumbing Inc. v. Scherer Fin. Servs. Co., 48 F.3d 1066, 1070 (8th Cir. 1995). This Court "has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment," including an "order denying a motion to dismiss a complaint." Id. The Court now proceeds to the Defendants' motion for summary judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party fails to meet this initial burden, the court must deny the motion, regardless of the non-moving party's response. See id.

When the moving party does meet its initial burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. Fed. R. Civ. P. 56(e); Lower Brule Sioux Tribe v. State of S.D., 104 F.3d 1017, 1021 (8th Cir. 1997). Instead, the nonmovant must set forth specific facts by affidavit or other evidence showing that a genuine issue of material fact exists. See id. Summary

judgment is not a disfavored procedural shortcut. To the contrary, it is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. Celotex, 477 U.S. at 327.

II.

A.

Counts I and N of the Plaintiffs' Second Amended Complaint (Doc. 60) alleges that "defendant Outdoor[3] formed an association-in-fact with Outdoor's client railroad[s] ... for the purpose of defrauding the [P]laintiffs and other small billboard businesses and their owners." Second Amend. Compl., Pars. 162-64, 206-208. These client railroads are the Burlington Northern/Santa Fe Railroad ("Burlington"), the Kansas City Southern Railway ("Kansas City Southern"), and the Boston & Maine Railroad ("Boston & Maine"). This association-in-fact, according to the Plaintiffs, is an "enterprise" as defined by the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1961(4).[4] The complaint provides that although each railroad comprised part of the association-in-fact, "it was a victim of the [D]efendant conspirators, not a conspirator itself." In other words, Burlington, Kansas City Southern and Boston & Maine were innocent members of the alleged "enterprise."

Count I alleges that the Defendants violated 18 U.S.C. § 1962(c)[5] and Count IV alleges that the Defendants violated 18 U.S.C. § 1962(d).[6] If a plaintiff establishes a violation under § 1962(c), he may establish a conspiracy to violate RICO "simply by presenting additional evidence that the defendant entered into an agreement

to breach the statute." Handeen v. Lemaire, 112 F.3d 1339, 1354 (8th Cir. 1997).

A RICO enterprise is generally established by showing three factors: (1) that the associated persons formed an ongoing organization; (2) they functioned as an ongoing unit; and (3) the organization was separate from the pattern of racketeering activity in which it engaged. See Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989). Although the Eighth Circuit has not directly addressed the issue, numerous courts have held that innocent participants cannot comprise an "association-in-fact" enterprise. See, e.g., 800537 Ontario Inc. v. Auto Enter., Inc., 113 F. Supp.2d 1116, 1123 (E.D. Mich. 2000); Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc., 62 F. Supp.2d 544, 551 (D. Conn. 1998). These courts reason that "for an association of individuals to constitute an 'enterprise' for purposes of RICO, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." Blue Cross, 62 F. Supp.2d at 551.

The Court agrees, and holds that an association-in-fact enterprise cannot consist of innocent participants. In re Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp.2d 196, 204-OS (D. Mass. 2004). As a result, Counts I and IV of the Plaintiffs' Second Amended Complaint fail as a matter of law. Neither Count indicates that Burlington, Kansas City Southern, or Boston & Maine shared a common purpose to engage in a particular fraudulent or conspiratorial course of conduct or worked together to achieve such goals. Blue Cross, 62 F. Supp.2d at 551. To the contrary, the Plaintiffs' Complaint states that these railroads were

"victims" of the defendant conspirators. For these reasons, the Defendants' motion for summary judgment on Counts I and IV is GRANTED.

B.

Count III of the Plaintiffs' Second Amended Complaint alleges that the Defendants violated 18 U.S.C. § 1962(a). That section makes it unlawful for any person to use or invest any part of income derived from a pattern of racketeering activity in the operation of any enterprise engaged in interstate commerce. Id. As the Eighth Circuit has explained, "RICO gives only individuals who have suffered injury from the use or investment of racketeering income standing to bring a civil suit under [§ 1962(a)] . . . ." Fogie v. Thorn Americas, Inc., 190 F.3d 889, 895 (8th Cir. 1999). Additionally, "to bring a claim under § 1962(a), a plaintiff must allege an injury from the use or investment of the racketeering income that is separate and distinct from injuries allegedly caused by the defendant's engaging in the predicate acts." Id. at 896; see also Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (8th Cir. 1994). Stated differently, a claim brought under 18 U.S.C. § 1962(a) must be dismissed if a plaintiff alleges "only injuries traceable to the alleged predicate acts." Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 494 (6th Cir. 1990).

Here, the gravamen of the Complaint is that the Defendants allegedly duped the Plaintiffs into revealing desirable billboard sites to them, and the Defendants then stole those sites for their own benefit. The Plaintiffs contend that § 1962(a) is satisfied because the Defendants reinvested the money earned from stealing

those billboard sites into Outdoor which strengthened Outdoor's position in the billboard market, making it more difficult for the Plaintiffs to compete with Outdoor, and causing the Plaintiffs to lose "lucrative billboard locations." The Court disagrees, and finds that the Plaintiffs' argument is pure speculation. As the Defendants correctly note, "Plaintiffs have failed to point to a single piece of evidence showing that they have sustained 'investment' injuries under § 1962(a) that are ***distinct*** from the injuries they allegedly suffered from the various predicate acts they allege." See Doc.147, at 23-24 (emphasis in original).

For these reasons, the Defendants' motion for summary judgment on Count III is GRANTED.

C.

Count V of the Plaintiffs' Second Amended Complaint seeks preliminary and permanent injunctive relief "prohibiting continuation of corrupt scheme and racketeering activity." To support this Count, the Plaintiffs rely solely on RICO. Several courts have held, however, that injunctive relief is not available to civil RICO plaintiffs. In re Fredeman Litig., 843 F.2d 821, 828-29 (5th Cir. 1988); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076,1080-89 (9th Cir. 1986); First Nat'l Bank & Trust Co. v. Hollingsworth, 701 F. Supp. 701(W.D. Ark. 1988).[7]

As the Hollingsworth court stated:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting

> private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Hollingsworth, 701 F. Supp. at 703 (emphasis in original) (internal citations and quotations omitted). This Court agrees, and holds that injunctive relief is not available to private RICO plaintiffs. Accordingly, the Defendants' motion for summary judgment on Count V is GRANTED.

D.

After reviewing the record, and at this time, it is sufficient for the Court to hold that a material issue of fact exists with Count II (RICO violation under 18 U.S.C. § 1962(c)), Count VI (claim for fraudulent misrepresentations), Count VII (claim for tortious interference with a business expectancy), and Count VIII (claim for unfair competition). Therefore, the Defendants' motion for summary judgment with respect to those Counts are DENIED. Of course, the Defendants may raise these issues at a later date, including a motion for judgment as a matter of law.

In anticipation of trial, three additional points should be mentioned. First, the Plaintiffs incorrectly contend that if the individual Defendants did not directly participate in at least two predicate acts, they can be held liable for "aiding and abetting" predicate offenses. They argue that "RICO recognizes civil liability for those who merely aid and abet the underlying predicate offenses." Amend. Suggs. in Opp., at 35. That assertion is legally erroneous.

In Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), the United States Supreme Court held that there is no private right of action for aiding and abetting securities fraud under § 10(b) of the Securities Exchange Act. Extending the Central Bank ruling, the Third Circuit Court of Appeals recently ruled that "because RICO's statutory text does not provide for a private cause of action for aiding and abetting and 18 U.S.C. § 2 cannot be used to imply this private right, no such cause of action exists under RICO." Pennsylvania Assn of Edwards Heirs v. Rightenour, 235 F.3d 839, 840 (3rd Cir. 2000). The Court agrees with the reasoning of Rightenour.

Therefore, although the Plaintiffs may assert at trial that the individual defendants directly participated in predicate acts, Plaintiffs may not rely on an "aiding and abetting" theory to establish liability. Nor will the Court instruct the jury on an aiding and abetting theory.

Second, the Defendants argue that "civil RICO plaintiffs cannot recover for a RICO claim based on alleged predicate acts of mail and wire fraud" without also establishing "detrimental reliance and damage." See Doc. 147, at 6. The Plaintiffs apparently refute that argument, but their position is somewhat unclear. Amend. Suggs. in Opp. at 11-16.

As this Court, and numerous others have recognized, when a "[p]laintiff bases a RICO claim on predicate acts of mail fraud and wire fraud, detrimental reliance on the alleged fraudulent acts must be established." Arno Park, Inc. v. Yogurt Ventures U.S.A., Inc., 1994 WL 740895, at * 3 (W.D. Mo. Dec. 9,1994); see also

Appletree Square I. Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994); Nolan v. Galaxy Scientific Corp., 269 F. Supp.2d 635, 641 (E.D. Pa. 2003) (recognizing that "a number of other circuits have similarly concluded that reliance must be shown before mail fraud will serve as a RICO predicate act") (internal citations omitted); Williams v. Dow Chem. Co., 255 F. Supp.2d 219, 227 (S.D.N.Y. 2003) (stating that a "plaintiff alleging predicate acts sounding in fraud-such as those instances of mail fraud and wire fraud ... must prove justifiable detrimental reliance to establish causation").

Therefore, at trial, if the Plaintiffs contend that the Defendants committed predicate acts of mail and wire fraud, they must establish (1) a plan or scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails or wires would be used to further the scheme; and (4) actual use of the mails or wires to further the scheme. United States v. Frank, 354 F.3d 910, 91718 (8th Cir. 2004). In addition, the Plaintiffs must also establish detrimental reliance and damages. Arno Park, Inc., 1994 WL 740895, at * 3. Both parties should keep these requirements in mind when drafting their proposed jury instructions.

Third, according to the Court's Scheduling Order, motions in limine must be filed 30 days before the date of trial,' and responses shall be filed 7 days later. Considering the track record of this litigation, the Court anticipates a deluge of motions in limine. Rather than rule on these motions by written orders, a hearing shall be held on Thursday, June 23, 2005, commencing at 9:00 a.m., in Courtroom #8B of the United States Courthouse at 400 E. 9th Street in Kansas City,

Missouri. Although the parties may still file their motions in limine 30 days before the date of trial, the Court intends to resolve all pre-trial evidentiary matters at the hearing.

III.

For the reasons stated above, it is hereby

ORDERED that the Defendants' motion for summary judgment with respect to Counts I, III, IV, and V of the Plaintiffs' Second Amended Complaint is GRANTED, and those Counts are DISMISSED WITH PREJUDICE, it is further

ORDERED that the Defendants' motion for summary judgment with respect to Counts II, VI, VII, and VIII are DENIED; it is further

ORDERED that a hearing on the parties' motions in limine shall be held on Thursday, June 23, 2005, commencing at 9:00 a.m., in Courtroom #8B of the United States Courthouse at 400 E. 9th Street in Kansas City, Missouri.

SO ORDERED.

Footnotes

[1]Technically, the Plaintiffs' amended suggestions in opposition are attached as an exhibit to Document 142, which is their motion for leave to file amended suggestions in opposition.

[2]The facts of this case are found within the parties'

numerous (and voluminous) filings with the Court. This Order only discusses those facts relevant to the Court's rulings herein. Of course, all facts must be construed in a light most favorable to the non-moving party. Carter v. Chrysler Corp., 173 F.3d 693, 696 (8th Cir. 1999).

[3]Of course, Viacom Outdoor, Inc. was formerly known as Infinity Outdoor, Inc. For the purpose of consistency, this Order will use "Outdoor" to describe both entities.

[4]The term "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[5]In its entirety, 18 U.S.C. § 1962(c) provides that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[6]18 U.S.C. § 1962(4) provides that "[i]t shall be unlawful for any person to conspire to violate [18 U.S.C. § 1962 (a), (b), or (c)]."

[7]It does not appear that the Eighth Circuit has squarely addressed this issue.

7/21/2004

Case No. 04-0074-CV-W-DW
IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

ORDER

Pending before the Court is the Defendants' motion to dismiss the Plaintiffs' First Amended Complaint (Doc. 17). The Plaintiffs filed suggestions in opposition (Doc. 22) and the Defendants filed a reply (Doc. 28). After reviewing the record and the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Defendants' motion to dismiss.

I.

The Defendants' motion to dismiss argues that the Complaint should be dismissed for three primary reasons: (1) the Plaintiffs fail to state a RICO claim upon which relief may be granted; (2) Plaintiff Curtis

Massood's ("Massood") claims are barred by res judicata;[1] and (3) Massood lacks standing to assert any claim against the Defendants. Both parties have submitted well-reasoned briefs to support their respective positions on these issues.[2] After a careful review of the record, the Court finds Massood lacks standing to pursue his claims. The Court also finds that the remaining Plaintiffs have pled facts sufficient to allow their suit to survive the pending motion to dismiss.

II.

When considering any motion to dismiss a district court is "constrained by a stringent standard." See Parnes v. Gateway 2000, Inc., 122 F.3d 539, 545-46 (8th Cir. 1997). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.; Osborn v. United States, 918 F.2d 724, 728-30 (8th Cir. 1990). Additionally, factual allegations in the complaint must be construed in the light most favorable to the plaintiff. Kushner v. Beverly Enters., Inc., 317 F.3d 820, 824 (8th Cir. 2003) (citations omitted).

III.

In this case, Massood "seeks to recover the *loss he suffered as a result of the lost value in the Wilson-Curtis shares* he owned caused by Outdoor's scheme to reduce the value of Wilson-Curtis." See First Amend. Compl., Par. 14 (emphasis added). To recoup these losses, Massood alleges causes of action against the Defendants for RICO violations, tortious interference,

fraud and unfair competition. In turn, the Court will analyze whether Massood has standing to bring these claims.

As a preliminary matter, it is axiomatic that a shareholder lacks standing to sue for injury to a corporation because the shareholder suffers only derivatively, i.e., "the decrease in the value of his investment." Dayton Monetary Assoc. v. Donaldson, Lufkin & Jenrette Sec. Corp., 1993 WL 410503 * 1 (S.D.N.Y. Oct. 14, 1993); see also Peterson v. Kennedy, 791 S.W.2d 459, 464 (Mo. Ct. App. 1990) (recognizing that if a cause of action is based on the "diminished value of plaintiffs' shares ... plaintiffs' action is a derivative shareholders' suit"). Consequently, "[f]ederal courts have held repeatedly that `shareholders of a corporation lack standing as individuals to bring a RICO action for diminution in the value of their stock allegedly caused by racketeering activities conducted against the corporation.'" Miller v. Loucks, 1992 WL 329313, 12 n. 5 (N.D. Ill. Nov. 5, 1992) (internal citations omitted). Consequently, because the Defendants' alleged racketeering activities diminished the value of his Wilson-Curtis stock, Massood lacks standing to pursue his RICO claims (Counts I-VI).

Next, under Missouri law, the "[c]orporation, rather than its shareholders, [is] the party aggrieved by intentional interference with the corporation's business expectancies." 45 Am. Jur. 2d Interference § 45 (citing 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858 (Mo. Ct. App. 1995)). Massood therefore lacks standing to bring his tortious interference claim (Count VIII).

Finally, the Court agrees with the Defendants in that "Massood bases his fraud and unfair competition claims ... on [D]efendants' alleged misrepresentations to Massood concerning the billboard sites he identified to Viacom Outdoor." See Doc. 17, Defs.' Suggs. in Supp., at 24. Under Missouri law, "misrepresentation claims based upon ... statements made to the officers or sole shareholders of a corporation belong to the corporation, not the individual officers or sole shareholders." Warren v. Mercantile Bank of St. Louis, 11 S.W.3d 621, 622-23 (Mo. Ct. App. 1999); see also Sequa Corp. v. Cooper, 128 S.W.3d 69, 75 (Mo. Ct. App. 2004). Accordingly, the Court finds that any fraud (Count VII) and unfair competition (Count IX) claims belong to Wilson-Curtis, and not to Massood individually. As a result, Massood lacks standing to bring his fraud and unfair competition claims.

VI.

For all the foregoing reasons, the Court finds that Massood lacks standing to pursue all Counts alleged in the Complaint. The Court also finds that under applicable law, the other Plaintiffs have pled facts sufficient to allow their suit to survive the pending motion to dismiss. Accordingly, it is hereby

ORDERED that Massood has failed to state any claim upon which relief may be granted and therefore the Defendants' motion to dismiss with respect to Massood is GRANTED; it is further

ORDERED that the Defendants' motion to dismiss the other Defendants and Counts of the Plaintiffs' First Amended Complaint is DENIED.

SO ORDERED.

Footnotes

[1] On September 24, 2002, the Missouri Court of Appeals held that Massood lacked standing to pursue claims similar to those in the case at bar. Massood v. Infinity Outdoor, Inc., No. WD60956 (Mo. Ct. App. 2002). Because the Court finds that Massood also lacks standing in this case, it need not address the Defendants' res judicata argument.

[2] Despite a myriad of factual and legal issues involved, the Court attempts to draft this Order as brief and concise as possible.

7/18/2006

Case No. 04-0074-CV-W-DW

IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

JUDGMENT IN A CIVIL CASE

X Decision by Court. This action has come before the Court as a briefed matter and a decision has been rendered.

ORDERED (December 14, 2005) - For Plaintiff Craig: Against Defendant Viacom, $125,000 for actual damages on a single state law claim, and $1,044,445 in punitive damages on that single state law claim. In addition, against Defendants Kelly and Gustin, $325,000 damages under RICO, trebled by statute to $975,000. Thus, the judgment for Craig totals $2,144,445.

For Plaintiff Midwest: Against Defendant Viacom, $125,000 for actual damages on a single state law claim, and $1,044,445 in punitive damages on that single state

law claim. In addition, against Defendants Kelly and Gustin, $325,000 damages under RICO, trebled by statute to $975,000. Thus, the judgment for Midwest totals $2,144,445.

For Plaintiff Patriot: Against Defendant Viacom, $80,000 for actual damages on a single state law claim, and provisionally, $1,044,445 in punitive damages on that single state law claim (subject to remittitur - on the Court's motion - consistent with the Connecticut punitive damages cap and federal due process). In addition, against Defendants Kelly and Gustin, $240,000 damages under RICO, trebled by statute to $720,000. Thus, the judgment for Patriot totals $1,844,445 (subject to remittitur-on the Court's motion-consistent with the Connecticut punitive damages cap and federal due process).

ORDERED (July 18, 2006) THAT: Plaintiffs shall recover from Defendants Kelly and Gustin a RICO fee award of $1,863,840.00, which includes $1,809,500.00 in reasonable attorney fees and $54,340.00 in reasonable out-of-pocket expenses; and ORDERS that a final punitive damages judgment of $50,000.00 on a single state law claim be entered for Plaintiff Patriot against Defendant Viacom; and ORDERS that Defendant Viacom is sanctioned under Rule 37 with a fine of $10,000.00.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3335
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.;
Defendant,

Wally Kelly;
Defendant-Appellant,

Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3337
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.,
Defendant-Appellant,

Wally Kelly; Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3339

Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.; Wally Kelly; Randall F. Romig; Randy Jackson, Defendants,

Harold Gustin, Defendant-Appellant, CPA Carlton Beckstrom,
Defendant.

No. 06-3341
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellants,

v.

Viacom Outdoor, Inc.; Wally Kelly,
Defendants-Appellees,

Randall F. Romig; Randy Jackson,
Defendants,

Harold Gustin,
Defendant-Appellee,

CPA Carlton Beckstrom,
Defendant.

Appeals from the United States District Court for the Western District of Missouri.

ORDER

The petition for rehearing en banc filed by Appellees/Cross-Appellants Craig Outdoor Advertising, Inc., Curtis Massood, Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC is denied. The petition for rehearing by the panel is also denied.

VIACOM
OUTDOOR

January 13, 2003

Mr. Frank J. Vargish, III, Esq.
TUCKER OUTDOOR
1800 Millport Road
Lancaster, PA 17602

Re: Applications # RR 7074(E) – PRR 7077(E)

Dear Mr. Holmes:

We are in receipt of your request to erect four sign structures on land Viacom Outdoor Group Inc. licenses or leases from Pennsylvania Lines LLC, as follows:

> 4 Sites – Along the S/S US 30; W/O Rt 100 Phoenixville Pike; Exton, PA.

Your request will be reviewed and processed and you will be notified whether or not it is approved for further processing in the ordinary course. If approved, we require a $500 per application processing fee in order to obtain required site and engineering approval from the railroad along with subsequent licensing. Upon said approval you will be sent a standard from license setting forth the terms upon which Viacom Outdoor is willing to allow erection and operation of your proposed sign structure.

Please be informed that until such time as you receive written confirmation of the approval of your application and a license agreement is fully executed, you are not

authorized to survey the subject property, apply for any permits or take any other action which impacts the subject land, including but not limited to applying for zoning approval or variance, without the express and specific written consent of Viacom Outdoor, which may be given or denied at the sole discretion of Viacom Outdoor. The granting of any such consent shall not be deemed nor relied upon to be final approval of your application. Any such action undertaken prior to final approval of your application and full execution of a license shall be taken at your sole risk and expense without any reimbursement from Viacom Outdoor or Pennsylvania Lines LLC.

Very truly yours,

Harold Gustin
Senior Vice President
Landlease

Cc: Don Avjean
Tom Rende